No. 06-528

IN THE

Supreme Court of the United States

TOM LUNDEEN, *et al.*
Petitioners,

v.

CANADIAN PACIFIC RAILWAY COMPANY, *et al.*
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the decision below correctly adheres to unanimous circuit court precedent by confirming the complete preemptive effect of the Federal Railroad Safety Act, without regard to the relief available after removal jurisdiction attaches?

PARTIES TO THE PROCEEDINGS

Petitioners are Tom and Nanette Lundeen, individually and on behalf of Molly and Michael Lundeen, minors; Melissa Todd; Irene Clare Korgel; Trent and Randi Lou Westmeyer; Darla M. Just; Mary Beth Gross, individually and on behalf of Brett Gross, a minor; Mark and Sandra Nesbit; LeRoy Slorby; Ray Lokoduk; JoAnn Flick; Wilfred and Geraldine Dahly; Marilyn Carlson; Gerald Wickman; Dion and Brenda Darveaux, individually and on behalf of Kendall Darveuax, a minor; Shelly Hingst; Bobby and Mary Smith; Richard Muhlbradt; Doug Weltzin; Nathan and Nichole Freeman, individually and on behalf of Ashlyn Freeman, a minor; Charlotte Goerndt; Leo Gleason; Judy Deutsch, individually and on behalf of Tyrone Deutsch, a minor; Denise Duchsherer, Leo Duchsherer, and Joshua Duchsherer; Larry and Carol Crabbe; Rebecca M. Behnkie, individually and on behalf of Nathaniel Behnkie, a minor; Charles and Sandra Swenson; Larry and Tami Schafer, individually on behalf of Jenna Schafer, a minor; John Salling, individually, and Lorenda Poissant Salling, individually and on behalf of Sebastian Poissant, a minor; Rachelle Todosichuk; Lonni Shigley; and Richard McBride and Linda McBride.

Respondents are Canadian Pacific Railway Company, Canadian Pacific Limited, Canadian Pacific Railway Limited, and Soo Line Railroad Company.

RULE 29.6 STATEMENT

Canadian Pacific Railway Company is a wholly-owned subsidiary of Canadian Pacific Railway Limited; Soo Line Railroad Company is an indirect wholly-owned subsidiary of Canadian Pacific Railway Company. Canadian Pacific Limited changed its name to Fairmont Hotels & Resorts Inc. as of October 1, 2001, and since that date has no relationship to Canadian Pacific Railway Limited, Canadian Pacific Railway Company or Soo Line Railroad Company. No other publicly held corporation owns 10% or more of the shares of either Canadian Pacific Railway Company, Canadian Pacific Railway Limited, or Soo Line Railroad Company.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit affirming removal on complete preemption grounds is reported at 447 F.3d 606 and reproduced in petitioners' appendix ("Pet. App.") at 1a-29a. The order denying rehearing en banc and rehearing by the panel is unreported, but reproduced at Pet. App. 53a.

The decision of the United States District Court for the District of Minnesota denying an initial motion to remand is reported at 342 F. Supp. 2d 826; the ultimate remand after express references to federal law were excised from the complaint is unreported, but available at 2005 WL 563111. The district court's decisions are reproduced at Pet. App. 30a-42a and Pet. App. 43a-52a, respectively.

JURISDICTION

Petitioners timely sought to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This Petition implicates the Federal Railroad Safety Act (49 U.S.C. § 20101, *et seq.*) and provisions of Title 28 affording federal question removal jurisdiction (28 U.S.C. §§ 1331 & 1441).

RESPONDENTS' STATEMENT OF THE CASE

The nation's railroads are the paradigm of interstate commerce, prompting this Court to long ago recognize that federal oversight "is practically indispensable to the operation of an efficient and economical national railway system." *S. Pac. Co. v. Arizona*, 325 U.S. 761, 771 (1945). Congress made that indispensable federal governance "exclusive" with the enactment of the Federal Railroad Safety Act ("FRSA").

The FRSA vests the Federal Railroad Administration ("FRA") with plenary authority to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. § 20103 (emphasis added). To safeguard against local interference Congress preempted all state laws based upon subject matters "covered" by FRA standards. 49 U.S.C. § 20106. This extraordinary preemptive force reflects both the supremacy of federal law and superiority of a unitary federal forum:

> [S]afety in the nation's railroads [is not] advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems.
>
> * * *
>
> [Indeed,] the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. . . . To subject a carrier to enforcement before a number of different state administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109, 4110-11.

Petitioners decry the extension of federal jurisdiction to claims "covered" by FRA regulations, but every circuit opinion addressing the jurisdictional impact of the FRSA holds the preemption effected to be "complete" so as to permit removal. *Lundeen v. Canadian Pac. Ry. Co.*, 447 F.3d 606, 607 (8th Cir. 2006); *Peters v. Union Pac. R.R. Co.*, 80 F.3d 257, 262 (8th Cir. 1996); *Rayner v. Smirl*, 873 F.2d 60, 66 (4th Cir.), *cert. denied*, 493 U.S. 876 (1989).[1] In an attempt

[1] Complete preemption does not require that "covered" claims "must be removed," "may only be brought in federal court," or "must be heard in

to invent a schism in authority petitioners castigate the *Lundeen* court for not mechanically following other holdings that have cabined the jurisdictional implications of substantially different statutory schemes to cases in which federal remedies are substituted for preempted state claims. Pet. at 13-23.

Nothing about the distinct approaches to preemption that discrete statutes have produced is "compelling." Sup. Ct. R. 10. The jurisdictional boundaries of the FRSA cannot be surveyed through the prisms of divergent statutory regimes. On the contrary, the result is dictated by the language of the statute, and not surprisingly the FRSA's broad terms have prompted circuit courts to unanimously recognize the statute's complete preemptive effect. Furthermore, the Court has rejected the premise for this Petition: a federal remedy is not a prerequisite to the exercise of federal question jurisdiction by way of complete preemption or otherwise. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 317-18 (2005); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 391 n.4 (1987).

With the circuit courts speaking as one and the federal remedy prerequisite a fiction, this case is not a worthy vehicle for illuminating the scope of federal jurisdiction; the path is already well lit.

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federal in federal court." Petition ("Pet.") at 2. Rather, as with all 28 U.S.C. § 1441 removals resort to a federal forum is at a defendant's option.

BACKGROUND

I. THE ACCIDENT

On January 18, 2002, a Canadian Pacific Railway train derailed near Minot, North Dakota. Amended Complaint, ¶ VIII.[2] Several tank cars carrying anhydrous ammonia released their lading. *Id.* According to petitioners:

> The Minot Derailment was caused by an ineffective and inadequate inspection and maintenance program by Defendant CPR. CPR's inspection and maintenance program failed to identify or replace cracked joint bars before those joint bars completely fractured.

Id. at ¶ XVII.

Petitioners seek redress for personal injuries and property damages allegedly sustained. *Id.* at ¶ XXXVIII.

II. THE ENSUING LITIGATION

This litigation ended up before the Eighth Circuit after a most circuitous jurisdictional journey. An overview of the complex proceedings below follows.

A. The first Minot derailment lawsuits.

Even before debris from the derailment could be cleared a putative class action was launched in North Dakota federal court. *See Mehl v. Canadian Pac. Ry. Ltd.*, 227 F.R.D. 505, 507 (D.N.D. 2005). A class encompassing these petitioners was later certified. *Id.* at 515, 522.

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[2] The pleadings determine whether the subject matter of the claims is "covered" for FRSA preemption purposes. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 665 (1993) (assuming the complaint "states a valid cause of action"). Thus the "facts" upon which the preemption analysis must be based are drawn from the complaint, reproduced in respondents' appendix ("Resp. App.") at 1a-19a.

Approximately one year after the accident, dozens of North Dakotans shopped individual lawsuits in a forum far from Minot – the Hennepin County, Minnesota district court. *See, e.g., Allende v. Soo Line R.R. Co.*, No. 03-3093, slip op. (D. Minn. Jan. 29, 2004) (Resp. App. at 20a-54a). The claimants fled their home state because North Dakota tort reforms curb punitive damages and eliminate joint and several liability. N.D. Cent. Code § 32-03.2-02; N.D. Cent. Code § 32-03.2-11(4).[3] Besides that, a jury drawn from metropolitan Minneapolis was perceived to be more sympathetic.

The state court lawsuits were promptly removed to federal court on complete preemption grounds. The federal court remanded, believing that removal jurisdiction is foreclosed by the FRSA's failure to afford a substitute federal remedy for the preempted state claims. *Allende*, slip op. at 18-20. Unfortunately, that denial of federal jurisdiction escaped appellate scrutiny. 28 U.S.C. § 1447(d).

B. The *Lundeen* district court proceedings.

Following *Allende*, litigation from Minot – including petitioners' cases – deluged the Minnesota court. The *Allende* precedent precluded removal of the subsequent case filings on complete preemption grounds. Petitioners, however, provided a path to the federal courthouse by pleading federal environmental claims. *Lundeen v. Canadian Pac. Ry. Co.*, 342 F. Supp. 2d 826, 829 (D. Minn. 2004). This group of cases was promptly removed.

The district court rejected petitioners' first request for remand because the federal claims expressed on the face of the complaints invoked federal question jurisdiction. *Id.* at 829-31. A second remand motion succeeded after petitioners

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[3] Petitioners' stratagem ultimately failed: the Minnesota state court rejected punitive damages and applied North Dakota law. *In re: the Soo Line Co. Derailment of Jan. 18, 2002 in Minot, ND*, No. MC 04-007726, slip op. at 1, 3 (Minn. Dist. Ct. Dec. 21, 2005) (Resp. App. at 55a-72a).

were allowed to purge all federal references. *Lundeen v. Canadian Pac. Ry. Co.*, No. 04-3220, 2005 WL 563111, at *3 (D. Minn. Mar. 9, 2005) (Pet. App. at 43a-52a). Because federal jurisdiction had been initially accepted the second remand order was discretionary and, therefore, appealable. *See, e.g., Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996) (remands not pursuant to 28 U.S.C. § 1447 subject to appellate review); *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 541-42 (8th Cir. 1996) (remand of supplemental state claims appealable).

C. The appellate proceedings.

The remand order was challenged as an affront to the forum shopping admonition in *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988). After the briefing had closed, this Court affirmed the propriety of removal based upon underlying substantial federal questions, notwithstanding the absence of a parallel federal cause of action. *Grable*, 545 U.S. at 317-18. Shortly thereafter the Eighth Circuit decided *In re Derailment Cases*, which confirmed the pervasive implications of the FRSA in analogous derailment litigation. 416 F.3d 787, 793-94 (8th Cir. 2005). Reacting to these precedents the appellate court asked for supplemental briefing. *Lundeen v. Canadian Pac. Ry. Co.*, No. 05-1918, slip order (8th Cir. Feb. 13, 2006) (Resp. App. at 73a).

After further consideration the court enabled the jurisdictional effect of the FRSA to be realized. That result flowed from two Eighth Circuit pronouncements regarding the FRSA's complete preemption ramifications: *Peters v. Union Pac. R.R. Co.*, 80 F.3d 257 (8th Cir. 1996) (affirming removal); and *Chapman v. Lab One*, 390 F.3d 620 (8th Cir. 2004) (reversing removal). Prior to those decisions the Fourth Circuit had similarly recognized the jurisdictional effect of the FRSA. *Rayner v. Smirl*, 873 F.2d 60 (4th Cir.), *cert. denied*, 493 U.S. 876 (1989).

Since the FRSA had already been understood to have complete preemptive effect, the *Lundeen* panel merely needed to assess whether FRA regulations "covered" the subject matter of the claims as was the case in *Peters* and *Rayner*, or not as in *Chapman*. *Lundeen*, 447 F.3d at 613-14. Using negligent inspection allegations as a template, the Eighth Circuit found petitioners' claims to be subsumed by numerous federal standards. In particular,

> federal regulations establish a specific inspection protocol including how, 49 C.F.R. § 213.233(b), when, §§ 213.233(c) & .237(a)-(c), and by whom, §§ 212.203, 213.7 & .233(a), track inspections must be conducted; the regulations establish a national railroad safety program intended to promote safety in all areas of railroad operations, § 212.101(a); federal and state inspectors determine the extent to which the railroads, shippers, and manufacturers have fulfilled their obligations with respect to, among other things, inspection, § 212.101(b)(1); and railroads face civil penalties for violations, § 213 App. B. It is clear the FRA regulations are intended to prevent negligent track inspection and there is no indication the FRA meant to leave open a state law cause of action.

Id. at 614 (emphasis added). This regulatory "coverage" of track inspections rendered the litigation removable.

At the Eighth Circuit petitioners entreated for the imposition of the same complete preemption prerequisite now heralded before this Court – *i.e.*, the substitution of a federal remedy for the preempted state claims. Following this Court's guidance the appellate court rejected petitioners' pleas and allowed the FRSA's preemptive force to displace "covered" claims:

> "The issue of whether complete preemption exists is separate from the issue of whether a private remedy is created under a federal statute. *Cater-*

> *pillar*[,482 U.S. at 391 n.4]. Complete preemption can sometimes lead to dismissal of all claims in a case. Although courts may be reluctant to conclude that Congress intended plaintiffs to be left without recourse, *see M. Nahas & Co., Inc. v. First National Bank of Hot Springs*, 930 F.2d 608, 612 (8th Cir. 1991), the intent of Congress is what controls. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 45, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987) (citations omitted)."

Id. at 613 n.4 (quoting *Gaming Corp.*, 88 F.3d at 542).

A petition for en banc reconsideration was turned away. Pet. App. 53a.

THE WRIT SHOULD BE DENIED

I. CIRCUIT COURTS AGREE ABOUT COMPLETE FRSA PREEMPTION

Complete preemption removal is firmly rooted in Supreme Court jurisprudence. The acknowledgement of complete preemption under the FRSA does not break new ground: the Fourth and Eighth Circuits have endorsed the statute's jurisdictional implications and no other circuit court has disagreed. Such unanimity is antithetical to the "compelling reasons" necessary to justify certiorari review. Sup. Ct. R. 10.

A. Complete preemption removal is well established.

Complete preemption arises when "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar*, 482 U.S. at 393 (quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)). The doctrine is an exception

to the general bar against removal on account of a federal defense. *Id.*

The seminal precedent, *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers*, delineates the controlling analysis. 390 U.S. 557 (1968). The *Avco* union removed a strike injunction lawsuit, arguing that § 301 of the Labor Management Relations Act ("LMRA") overwhelmed the state law claim. *Id.* at 558-59. This Court agreed:

> An action arising under § 301 is controlled by federal substantive law even though it is brought in a state court. . . . It is thus clear that the claim under this collective bargaining agreement is one arising under the "laws of the United States" within the meaning of the removal statute.

Id. at 560 (citing 28 U.S.C. § 1441(b)).

Notably, the practical recourse available after removal was not a federal lawsuit; rather, the union was only accountable through a contractual dispute resolution process. The lack of judicial relief after removal was, nonetheless, irrelevant: "[t]he necessary ground of decision [in *Avco*] was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action [within its scope]." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 23 (1983) (emphasis added). *Accord Metropolitan Life*, 481 U.S. at 64. Hence, the breadth of a federal statute's preemptive "power" – not the availability of federal redress – is the touchstone of complete preemption, as *Caterpillar* and *Grable* later confirmed. *See infra* at 18-23.

B. The FRSA makes railroad regulatory oversight nationally uniform.

The preemptive effect of the FRSA is no less than the statute considered in *Avco*. Congress federalized regulation of the nation's rail transportation system regulation as follows:

> Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order:
>
> (1) is necessary to eliminate or reduce an essentially local safety or security hazard;
>
> (2) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (3) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106 (emphasis added). *Accord* 49 C.F.R. § 213.2.

Pursuant to this explicit mandate state law is displaced whenever "regulations issued by the Secretary cover the subject matter of the . . . allegations." *Easterwood*, 507 U.S. at 665 (emphasis added). *See also CSX Transp., Inc. v. Williams*, 406 F.3d 667, 672 (D.C. Cir. 2005) ("The FRSA preemption provision . . . authorizes the court only to determine whether the regulation covers the subject matter . . . .")

(emphasis in original). The statute's express displacement of state law could not be clearer or more powerful.

The genesis for FRSA preemption was the threat to interstate commerce posed by local oversight:

> [T]he railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. . . . To subject a carrier to enforcement before a number of different state administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4110-11 (emphasis added). Congress concluded that federal oversight would promote the safe operation of the nation's rail transportation system, a legislative judgment entitled to judicial obeisance.[4]

Giving effect to this purpose, the statute vests federal authorities with "exclusive" administration of railroad safety regulations. 49 U.S.C. § 20111(a). To protect against the parochial tendencies of state regulators, courts and juries, governmental authorities are singularly charged with FRA enforcement, and the forum for that enforcement is expressly federal. 49 U.S.C. § 20112 (authorizing federal court recourse by the United States Attorney General); 49 U.S.C. § 20113(a) & (b) (authorizing limited federal court action by a participating "State authority" if federal authorities fail to

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[4] Significantly, the complete preemptive effect of railroad legislation is not newly recognized. The Railway Labor Act and Interstate Commerce Act have both been held to completely preempt state claims. *Deford v. Soo Line R.R. Co.*, 867 F.2d 1080, 1084-85 (8th Cir.) ("We believe that the fundamental question is whether the RLA or the ICA so pervasively occupy the field of railroad governance that a competing state law claim necessarily invokes federal law."), *cert. denied*, 492 U.S. 927 (1989).

act). The statute contemplates litigation no place other than in federal court and subject exclusively to federal law.

C. Federal court is open for completely preempted FRSA claims.

The Fourth and Eighth Circuits are in synch: the FRSA is "so powerful" as to enable removal. *Rayner* was the first to recognize the statute's complete preemptive effect. In that wrongful discharge action the employee sought to elude the National Railroad Adjustment Board by suing in state court. *Rayner*, 873 F.2d at 62-63. The case was removed and remand denied. *Id.* at 63.

In affirming the jurisdictional ramifications of the FRSA the unanimous panel heeded Congress's judgment that "railroad safety is better served by uniform federal action rather than 'by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems.'" *Id.* at 65 (quoting H.R. Rep. No. 91-1194, *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109).[5]

The court reasoned:

> Congress' desire for national uniformity in railroad safety practices clearly is implicated by Rayner's common law claims. In one sense, of course, all the trier of fact need do in a wrongful discharge action is determine the reason for the discharge. In another sense, however, Rayner's claim of wrongful discharge for "whistleblowing" is inextricably

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[5] *Rayner* addressed the previous codification of preemption at 45 U.S.C. § 434; the renumbering of the preemption provision to 49 U.S.C. § 20106 was implemented "without substantive change." H.R. Rep. No. 103-180, (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 818. The lack of substantive change was recognized by this Court when the § 20106 iteration of FRSA preemption was given identical treatment in *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344 (2000) as the previous preemption provision – § 434 – considered in *Easterwood*.

> tied to the question of precisely what railroad safety practices he was blowing the whistle on. To the extent that the justifiable nature of the whistle-blowing enters the calculus in wrongful discharge actions, railroad safety laws might be subject to an unpredictable medley of jury determinations, which Congress, in its quest for national uniformity under [the FRSA], sought to avoid.

Id. at 66.

Because "[c]ongressional intent in the FRSA is clear," the applicable whistleblower regulation completely preempted parallel common law claims. *Id.* at 63-66.[6] That Fourth Circuit holding follows exactly the statutory directive.

Peters was the next circuit court precedent to allow the FRSA's preemptive reach to be realized. 80 F.3d at 260-62. The *Peters* plaintiff contested the railroad's refusal to return his engineer certificate by suing for conversion. After removal the preemptive realm of the FRSA was enforced in furtherance of the statutory intent to shut state courts out of railroad regulatory enforcement. *Id.* at 261 n.2 ("The FRSA's legislative history also emphasizes that railroad safety is better served by uniform federal action rather than by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems.") (quotation omitted). As in *Rayner*, complete preemption was deemed to reign whenever the subject matter of a state law claim is "covered" by FRA regulations. *Id.* at 261.

The appellate court found the certification process to be subsumed by numerous FRA promulgations, in particular 49

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[6] Although the Fourth Circuit reflected upon the "comprehensive remedial scheme for aggrieved railroad employees" provided by the relevant regulations, the appellate court engaged in that exercise only "to confirm its preemptive scope." *Id.* at 65. The words of the statute, not the provision of an administrative remedy, were dispositive.

C.F.R. §§ 240.401-.411. *Id.* at 261-62. Such "coverage" completely preempted plaintiff's tort claim and afforded federal jurisdiction. *Id.* at 262.[7] Removal was, therefore, affirmed.

In the wake of *Rayner* and *Peters*, the *Lundeen* court readily acknowledged the FRSA's jurisdictional implications. 447 F.3d at 612-13. In doing so the Eighth Circuit dismissed the contention that a federal remedy must be provided before complete preemption will lie. *Id.* at 613 n.4. Rather, complete preemption prevails upon the finding that the subject matter is "covered" by FRA regulations. *Id.* at 613-14.[8]

In all, three circuit court decisions have assessed FRSA complete preemption, and each has sustained removal. The only ostensibly contrary authority petitioners could muster is *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568 (5th Cir. 2004), *cert. denied*, 544 U.S. 992 (2005), and even then the case is mentioned only in passing. *Smallwood* arises from a car/train accident removed on diversity grounds despite the joinder of a non-diverse co-defendant. *Id.* at 571-72. The district court concluded that diversity jurisdiction attached because the joinder was fraudulent.

Addressing only the propriety of joinder, an en banc Fifth Circuit sent the case back to state court. *Id.* at 576. The opinion did not address, much less apply, complete preemption. *Id.* at 575-76 ("The railroad could not remove on the

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[7] Like in *Rayner* the Eighth Circuit noted in dicta that some of the "covering" regulations contemplated an administrative resolution of certification disputes. *Id.* at 261. These rules "serve[d] to confirm [the FRSA's] preemptive scope," not to establish the threshold for complete preemption. *Id.*

[8] Between *Peters* and *Lundeen* the Eighth Circuit acknowledged complete FRSA preemption in *Chapman*, but concluded that the claims in question were not "covered." 390 F.3d at 629. Without "coverage," preemption could not prevail.

basis of federal question jurisdiction because the only federal question appeared as a defense."). Thus there is no conflict to resolve; the improper joinder decision in *Smallwood* is not discordant with the *Rayner/Peters/Lundeen* harmony.[9]

D. Non-FRSA precedents do not repel the statute's jurisdictional force.

Petitioners contrive a circuit split by referencing the application of different statutes in obviously distinguishable cases. Pet. at 12-17. This ruse fails in its premise because the preemptive effects of distinct statutes cannot corral the FRSA's jurisdictional ramifications. *See, e.g., Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 446 (2005) ("[C]ourts [have] too quickly concluded that failure-to-warn claims were pre-empted under [the Federal Insecticide, Fungicide, and Rodenticide Act], as they were [under the Public Health Cigarette Smoking Act], without paying attention to the rather obvious textual differences between the two pre-emption clauses.").

For example, petitioners take the FRSA analysis in *Lundeen* to task with *Beneficial Nat'l Bank v. Anderson*, which applied the National Bank Act ("NBA"). 539 U.S. 1 (2003). Importantly, the NBA does not expressly preempt state law; instead, its limits on interest rates and contemplation of claims are deemed to displace conflicting state law actions. *Id.* at 9-11. In assessing the NBA's complete preemptive

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[9] The petitioners also pronounce the FRSA to be "a particularly unsuitable candidate for complete preemption [because of] the fine lines and particularized factual determinations that often divide the preempted tort claim from the non-preempted claim." Pet. at 20. But the operative "coverage" analysis is driven by the pleadings, not by "particularized factual determinations." *Easterwood*, 507 U.S. at 665 ("The sole issue here is preemption, which depends on whether the regulations issued by the Secretary cover the subject matter of the two allegations, each of which we may assume states a valid cause of action.") (emphasis added).

effect the Court considered federal cause of action availability, but because NBA preemption must be implied the federal relief merely reflected Congress's preemptive intent in the absence of a complete or clear preemptive mandate. *See also infra* at 18-23. By no means did the Court announce a new prerequisite to complete preemption applicable to all federal schemes.

The FRSA is substantially different. Congress displaced all "covered" state law claims with 49 U.S.C. § 20106. Consequently, the analysis does not depend upon additional evidence to divine preemptive intent. Regardless, all evidence points to an unmistakable congressional purpose to preclude railroad oversight interference by state authorities, including the courts. *See, e.g.*, H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4110-11 ("To subject a carrier to enforcement before a number of different state administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce."). The express language and clear legislative history obviate the need to discern congressional intent from the nature of relief available after removal, contrary to the statute at issue in *Beneficial Nat'l Bank.*

Petitioners also embrace authorities like *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785 (7th Cir. 2002). But *Rogers* addresses the Poultry Products Inspection Act ("PPIA"), which is far more limited than the FRSA. Among other differences, the PPIA circumscribes preemption to state laws that seek to enforce standards "in addition to, or different than" the established federal standards. 21 U.S.C. § 467e. In other words, PPIA preemption is not invoked so long as charges of negligence are consistent with the standard of care imposed by the applicable federal regulation.

In contrast, the FRSA preempts all state claims regardless of whether they are different from or in addition to FRA mandates. *See, e.g., Shanklin*, 529 U.S. at 358 (if regulatory

"coverage" exists, "[i]t is this displacement of state law concerning the [subject matter], and not . . . adherence to the federal standard . . . that preempts state tort actions") (emphasis added). This wholesale preemption of all "covered" claims is far more expansive than the PPIA's "not in addition to or different than" preclusion of state law. Consequently, the extent of the FRSA's preemptive effect cannot be measured by inapposite authorities like *Rogers*.

Again, the discrete statutory language controls when preemption is express. As a result, the terms of more constrained preemptive provisions cannot define § 20106's impact on this litigation. Obvious textual distinctions prevent analyses applicable to dissimilar legislation from being projected onto the FRSA in order to contrive the supposed conflict upon which this Petition is based.

E. Certiorari review is not justified.

The Court has long recognized the doctrine of complete preemption, and *Lundeen* brings the total of appellate precedents that have enforced the FRSA's complete preemptive effect to three. There is no jurisprudential need for the Court to weigh in on this most recent application of well-established authority. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

No circuit court has ever rejected, much less distinguished, *Rayner*, *Peters*, or *Lundeen*, and those decisions are firmly rooted in the FRSA's purposes. Accepting review on the basis of divergent non-FRSA authorities would be disruptive: the mere possibility that claims might experience a different outcome under an inapplicable and substantively different preemptive scheme would become the rationalization for certiorari review. The issue that drives the analysis is the displacement of state law effected by the FRSA, not the result that might be produced by some other statute's preemption provision. Until

there is a true FRSA conflict among the circuits the Court has no reason to squander certiorari review on *Lundeen*'s application of complete preemption. Sup. Ct. R. 10.

II. FEDERAL REMEDY AVAILABILITY IS NOT DISPOSITIVE

Certiorari review would not be warranted even if the conflict conjured up by petitioners was more than a chimera. The Court has taught that post-removal relief controls neither the complete preemption calculus nor any other federal question determination. This FRSA litigation is not an appropriate vehicle for the Court to impose an absolute condition upon the invocation of federal jurisdiction, especially when the Court has already spoken to the contrary.

A. A substitute federal remedy is not the jurisdictional *sine qua non.*

Petitioners want federal remedy availability to be the passport for removal. That result would re-write *Avco*, in which the Court blessed removal of a labor dispute despite federal law preclusion of the relief sought. 390 U.S. at 560-61. From that very beginning the opportunity to secure satisfactory redress after removal has not been a predicate to federal jurisdiction: "The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy." *Id.* at 561.

Avco reiterated this critical distinction to emphasize the removability of precluded state claims even though the displacing federal statute affords no satisfactory remedy: "[T]he breadth or narrowness of the relief which may be granted under federal law in § 301 cases is a distinct question from whether the court has jurisdiction over the parties and the subject matter." *Id.* In the Court's view, "[a]ny error in granting or designing relief 'does not go to the jurisdiction of

the court.'" *Id.* (quoting *Swift & Co. v. United States*, 276 U.S. 311, 331 (1928)) (citation omitted).

The federal jurisdiction / federal relief distinction was amplified in *Caterpillar*, which arose out of a contract action venued in state court. 482 U.S. at 390. The complaint sought redress under California law, but the defendant removed to federal court because the individual employment arrangements had been merged into collective bargaining agreements. *Id.* The district court retained jurisdiction and dismissed for failure to state an LMRA claim. *Id.*

The Ninth Circuit reversed for reasons that mirror petitioners' argument to this Court:

> A state law cause of action has been "completely preempted" when federal law both displaces and supplants the state law – that is, when federal law provides both a superseding remedy replacing the state law cause of action and preempts that state law cause of action. . . . These are two distinct inquiries, both of which must be satisfied to permit removal of an action to federal court.

Williams v. Caterpillar Tractor Co., 786 F.2d 928, 932 (9th Cir. 1986) (emphasis in original). The rationale was explained as follows:

> Although this argument [that a federal remedy is not necessary for removing completely preempted claims] is persuasive, and not directly contradicted by the Supreme Court's decision in *Franchise Tax Board*, we decline to follow it. It has long been the law in this circuit that removal jurisdiction lies only when federal law supplants, as well as displaces, state law. The existence of a substitute federal remedy, in addition to preemption, is required by our precedent.

Id. at 932 n.2.

This Court flatly rejected the suggestion that "a case may not be removed to federal court on the ground that it is completely pre-empted unless the federal cause of action relied upon provides the plaintiff with a remedy." *Caterpillar*, 482 U.S. at 391 n.4. Conditioning removal jurisdiction upon the provision of a federal remedy was "squarely contradicted by [this Court's] decision in *Avco*." *Id.* *Avco* was read to have

> held that a § 301 claim was properly removed to federal court although, at the time, the relief sought by the plaintiff could be obtained only in state court. We reasoned as follows: "The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy. . . . [T]he breadth or narrowness of the relief which may be granted under federal law in § 301 cases is a distinct question from whether the court has jurisdiction over the parties and the subject matter.". . . Thus, although we affirm the Court of Appeals' judgment, we reject its reasoning insofar as it is inconsistent with *Avco*.

Id. (quoting *Avco*, 390 U.S. at 561).[10]

Avco and *Caterpillar* belie the argument that complete preemption is conditioned upon a substitute remedy being at hand. Like the Eighth Circuit, the Solicitor General wholeheartedly supports that conclusion:

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[10] Petitioners urge the adoption of authorities like *Schmeling v. NORDAM*, 97 F.3d 1336 (10th Cir. 1996) to promote a federal remedy removal prerequisite. But that court's open hostility to *Caterpillar* exposes the jurisprudential flaws upon which *Schmeling* and its brethren are based. *Id.* at 1341 (*Caterpillar* "strayed from the narrow path"); *id.* ("*Caterpillar* neglected the emphasis in the previous cases . . . "); *id.* at 1343 ("Rightly or wrongly, the Supreme Court read the 'superseding remedy' language as contrary to *Avco*'s holding that the nature of the relief available is irrelevant to the jurisdictional question.") (emphasis added).

> *Avco* demonstrates that a plaintiff's ostensible state-law claim may come within the scope of a federal cause of action and be completely preempted, even if the cause of action does not provide the plaintiff with a remedy. *Caterpillar*, 482 U.S. at 391 n.4. *Avco* thus supports an argument that a plaintiff's claims may fall within the scope of a federal cause of action and be completely preempted, even if the plaintiff is unable to state a valid claim under the cause of action, provided that the plaintiff's claim is within the field regulated by the cause of action.

Brief for the United States as Amicus Curiae, *Davis v. Int'l Union, United Automobile, Aerospace & Agriculture Implement Workers of America*, at 19 (U.S. May 2006) (No. 05-107) (Resp. App. at 74a-100a) (emphasis added) (internal citation omitted).

The Solicitor General's reasoning shows the way: "[W]hen the limits on the federal cause of action are an integral part of the federal scheme, it would seem counterintuitive to find a claim to be not completely preempted precisely because it seeks relief antithetical to the pervasively federal regime." *Id.* For the same reason this case cannot become the means for diminishing the FRSA's preemptive effect exactly because the statue's preempting force is, in fact, "complete." The enactment's pervasive scope allows for no state law governance of railroads; that congressional judgment must be respected.

B. *Grable* lays the federal remedy prerequisite contentions to rest.

Avco's recognition that federal jurisdiction is not dependent upon federal remedy availability was endorsed by *Grable*, which arose out of a quiet title action calling an IRS property seizure into question. 545 U.S. at 310-11. Although the claim was a creature of state law, removal jurisdiction was invoked based upon the inherent federal question. *Id.*

This Court affirmed jurisdiction because substantial federal issues were implicated even though no federal remedy was provided. *Id.* at 314-15. *Grable* eschewed the suggestion that an alternative federal remedy alone affords federal forum access. *Id.* at 317-18 (discussing *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804 (1986)). Instead, the Court reminded that *Merrell Dow* had "disclaimed the adoption of any bright-line rule" and "treat[ed] the absence of a federal private right of action as evidence relevant to, but not dispositive of, the sensitive judgment about congressional intent that § 1331 requires." *Id.* at 317 (emphasis added). The "primary importance" of federal remedy unavailability in *Merrell Dow* only "emerged when the Court treated the combination of no federal cause of action and no preemption of state remedies for misbranding as an important clue to Congress's conception of the scope of jurisdiction to be exercised under § 1331." *Id.* at 318 (emphasis added). In contrast, § 20106 expressly preempts state law of all stripes as soon as regulatory "coverage" is extended.

Grable's treatment of general § 1331 jurisdiction follows the specific complete preemption doctrine applied in *Avco*, *Caterpillar*, and the decision below. Those precedents reject a federal remedy as talismanic of federal jurisdiction. Unlike in *Merrell Dow* and cases like *Beneficial Nat'l Bank*, the absence of a parallel remedy in the FRSA adds nothing to the comprehensive preemption that Congress necessarily effected by displacing all "covered" state claims. The statute's unequivocal language obviates the need to search for clues about congressional intent as might be required when legislation is less explicit, like with the NBA.

C. Settled precedent challenges do not warrant certiorari review.

The scope of preemption expressed by the FRSA could not be more broad. All that is necessary is regulatory "coverage." To the extent circumstantial evidence about legislative intent

is apposite, the jurisdictional mandate is evident without regard to a parallel remedial scheme:

> [S]afety in the nation's railroads [is not] advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems.
>
> * * *
>
> [Indeed,] the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. . . . To subject a carrier to enforcement before a number of different state administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109, 4110-11.

In the words of the Solicitor General, to hamstring the preemptive effect of the FRSA precisely because petitioners seek "relief antithetical to the pervasively federal regime" would be perverse. The Eighth Circuit's refusal to graft a federal remedy prerequisite onto the removal jurisdiction afforded by FRSA complete preemption complies with this Court's admonishments in *Avco*, as born out in both *Caterpillar* and *Grable*. As such, the Eighth Circuit did not come close to departing "from the accepted and usual course of judicial proceedings." Sup. Ct. R. 10. The Court does not need to make jurisdictional pronouncements that would simply reaffirm existing law.

CONCLUSION

Because there is no circuit conflict regarding the FRSA's jurisdictional effect, and because the Court has already rejected the imposition of a federal remedy prerequisite upon complete preemption and all other federal question jurisdiction, the Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Tom Lundeen, individually, and Nanette Lundeen, individually, and Tom Lundeen and Nanette Lundeen on behalf of, and as parents and natural guardians of Molly Lundeen, a minor, and Michael Lundeen,

Plaintiffs,

-vs-

Canadian Pacific Railway Company, Canadian Pacific Limited, Canadian Pacific Railway Limited and Soo Line Railroad Company,

Defendants.

Court File No._____
Case Type: Personal Injury

COMPLAINT AND DEMAND FOR JURY TRIAL

COMES NOW the Plaintiffs and bring this action for personal injury and property damage against the Defendants, and in furtherance of these claims, allege and state a follows:

I.

The Plaintiffs are Tom Lundeen, individually, and Nanette Lundeen, individually, ant Tom Lundeen and Nanette Lundeen, on behalf of and as parents and natural guardians o: Molly Lundeen, a minor, and Michael Lundeen, who was a minor at the time, who al resided at 716 36th Street S.W., Minot, North Dakota on January 18, 2002, and assert that they were injured and damaged in their person and property on that date as a result o: actions or inactions by the Defendants.

II.

Defendant, Soo Line Railroad Company is a corporation duly organized and existing under the laws of the state of Minnesota with its principal place of business located at 501 Marquette Avenue, Minneapolis, Minnesota.

III.

Defendant, Soo Line Railroad Company is a wholly-owned subsidiary of Defendant, Canadian Pacific Railway Company which, in turn, is a wholly-owned subsidiary of Defendant, Canadian Pacific Limited. Defendant, Canadian Pacific Railway Limited, is a Canadian corporation and a related company to the other Defendants. All of these Defendants did business in the state of Minnesota at relevant times to this cause of action. Defendants, Canadian Pacific Railway Company, Canadian Pacific Limited, Canadian Pacific Railway Limited, and Soo Line Railroad Company were all related companies and bear the responsibility and fault for the train derailment subsequently described in paragraph VIII. These Defendants shall be hereinafter collectively referred to as "Defendant CPR."

IV.

Defendant CPR is a duly licensed railroad in the United States and authorized to operate a system of railroads as a common carrier of freight in and through the states of North Dakota and Minnesota and including Hennepin County, Minnesota, as well as in other states in the United States of America and in Canada.

V.

Defendant CPR is subject to the rules, regulations, governance and obligated to comply with all regulations of the United States of America including the Federal Railroad Administration (FRA) and subject to, among other obligations, compliance with

FRA regulations and the Code of Federal Regulations (CFR) and all other regulations of the states of North Dakota and Minnesota and the United States of America for the operation of a railroad.

VI.

Defendant CPR is subject to the jurisdiction of this court in that the headquarters of Defendant CPR in the United States is located in Hennepin County, Minnesota, and critical decisions made by Defendant CPR were made in Hennepin County, Minnesota, including management decisions concerning track installation, track maintenance, assignment of personnel, allocation of resources, train operations, regulatory compliance and all manner of decisions affecting equipment, operations and resources of Defendant CPR.

VII.

Defendant CPR operates a railway that extends from beyond Medicine Hat, Alberta, Canada, to beyond St. Paul, Minnesota, and which runs northwest to southeast through the state of North Dakota. The track in North Dakota is part of the St. Paul Service Area. That portion of the track in the St. Paul Service Area in northwestern North Dakota is denoted as the Portal Subdivision. That portion of the track in the Portal Subdivision from approximately Kenmare, North Dakota, to approximately Minot, North Dakota, is denoted as the Kenmare Section. The derailment described in paragraph VIII occurred in the St. Paul Service Area, Portal Subdivision, Kenmare Section of Defendant CPR's main line track.

VIII.

At approximately 1:37 A.M. on January 18, 2002, an eastbound CPR freight train, designated 292-16, traveling about 41 miles per hour, derailed 31 of its 112 cars approximately one-half mile west of the city limits of Minot, North Dakota, at a location designated as MP ' 471.65. Five

tank cars containing liquefied anhydrous ammonia catastrophically ruptured, instantaneously releasing approximately 146,700 gallons of anhydrous ammonia. Seven pressurized tank cars were damaged, which subsequently lost some or all of their contents, resulting in an additional release of approximately 74,000 gallons of liquefied anhydrous ammonia, for a total release of anhydrous ammonia of approximately 221,000 gallons. This incident shall hereinafter be referred to as the "Minot Derailment."

IX.

At all times relevant, to the Minot Derailment, the train, track, ballast, sub-ballast, lading, equipment, maintenance, operations and personnel were all under the governance, supervision, administration and control of Defendant CPR, but subject to regulatory provisions of state and federal law.

X.

The tracks at the location of the Minot Derailment were classified as FRA Class 3 Track with a maximum speed limit for freight trains of 40 miles per hour, subject to a lower but not higher speed by regulation or CPR order. The CPR train designated 292-16 was travelling in excess of the authorized track speed at the time and location of the Minot Derailment, in excess of a reasonable speed for conditions at the time of the Minot Derailment, and in excess of a proper speed by regulation.

XI.

The tracks in the Kenmare Section were represented and contended to be continuous welded rail, a designation which purports to be and represents a claim that the rail is without joints, splices or plugs. In fact, at the time of the Minot Derailment between mile post 471 and 472, there were ten or more joints representing five or more plugs, which did not meet the definition of continuous welded rail and which, in

turn, affects authorized and reasonable speed of trains. Joints are, and it is well known to Defendant CPR, much weaker and more prone to failure than continuous welded rail.

XII.

The track at the time and place of the Minot Derailment was 100-pound rail, which is the lightest weight rail in use in the Defendant CPR's rail system. Defendant CPR has over 14,000 miles of track in its system with only 65 miles of 100-pound rail on its main line track. The entire 65 miles of 100-pound rail in CPR's rail system is found in North Dakota and two-thirds of it is located in the Kenmare Section, the remainder being in the adjoining section southeast of the Kenmare Section. 100-pound rail is considered lightweight rail not suitable for use on main lines that bear the amount of traffic experienced by the track in question. The Defendant CPR has increased track usage from approximately fifteen million tons per year in 1992 to twenty-five million tons per year, and this increased traffic heightens and increases the probabilities of failure, particularly with the 100-pound lightweight rail.

XIII.

The track at the time and place of the Minot Derailment was installed in 1973, but was not new at the time of its installation, having been salvaged from another location believed to be in Wisconsin. The rail had been manufactured sometime in the 1950's-making it nearly fifty years old. Further, the rail was worn, brittle and problematic. As a result, the rail required frequent repairs as defects were discovered, which Defendant CPR chose to repair by installing plugs, creating two joints per plug instead of welding. The height of the plugs used by Defendant CPR do not match the height of the existing worn rail which, in turn, puts additional stresses on the joints and increases the probability, if not likelihood, of catastrophic derailments.

Plugs are far less safe than welding but less expensive to CPR. CPR knew plugs were less safe but chose them to save money.

XIV.

Defendant CPR is aware of and acknowledges that rail containing joints is more likely to have separations, gaps, pull-aparts, breaks or other failures during extremely cold weather. Yet, during these times Defendant CPR furloughed track maintenance workers and declined to perform normal track maintenance, walking inspections or other inspections designed to determine the presence of problems at joints, including (but not limited to) cracked or broken joint bars, bent or loose bolts, rail end batter and other clear indications of problems likely to result in catastrophic derailments.

XI.

Defendant CPR has conducted a systematic and planned reduction in force, including reducing personnel intended to maintain and service its main line track in North Dakota. CPR further designated work to the remaining maintenance personnel in such a way as to prevent or severely curtail welding of temporary joints. Defendant CPR further discontinued the use of inspection and ultrasonic testing devices which had, as their purpose, the identification of cracked or broken joint bars. The use of such inspection and testing devices had been implemented by CPR following the hereinafter described Burlington Derailment which occurred in 1994, and which was caused by the same negligent acts or omissions as those that caused the Minot Derailment.

XVI.

Defendant CPR had adopted standards and practices for its track, track maintenance, equipment and other matters relating to the main line track effective for the time and place of the Minot Derailment. Defendant CPR failed to adequately

train, inform, test or otherwise implement and verify that its practices and procedures had been learned and implemented by its personnel prior to the Minot Derailment.

XVII.

The Minot Derailment was caused by an ineffective and inadequate inspection and maintenance program by Defendant CPR. CPR's inspection and maintenance program failed to identify or replace cracked joint bars before those joint bars completely fractured. This cracking led to a rail separation, causing CPR train designated 292-16 to derail which, in turn, caused the failure of pressurized tank cars releasing 221,000 gallons of anhydrous ammonia, which blanketed the area adjacent to the tracks and engulfed many homes in the Minot and Minot area.

XVIII.

The Minot Derailment was caused by two broken joint bars at a joint located at mile post 471.65 in Defendant CPR's Kenmare Section which was designated by its configuration as a "temporary" joint. The broken joint bars were installed in the north rail at milepost 471.65 in May of 2000. Joints designated as temporary should be welded as soon as practical, but certainly within thirty days of installing the joint bars. CPR failed to weld the temporary joint for more than 20 months following its installation.

XIX.

The joint that failed and led to the Minot Derailment was repaired by CPR in the summer of 2001 when it was discovered that there were loose, bent or otherwise damaged bolts and nuts. Loose, damaged, bent or broken nuts and bolts are indicia of rail stress which, in turn, are indicia of likely or imminent failure of a joint, requiring prompt, if not immediate, welding of the rail and, in the interim, a reduction in speed to decrease the probability of a catastrophic

derailment. CPR failed to weld the temporary joint for more than six months following its repair and failed to reduce train speed.

XX.

The nuts and bolts at joints, whether temporary or permanent, are required to be torqued to 550-foot pounds. The nuts and bolts at mile post 471.65 were removed following the derailment and found to be 54-foot pounds, 126-foot pounds, 205-foot pounds and 402- foot pounds, all of which are far below the specification of 550-foot pounds for rail joint nuts and bolts and that loose nuts and bolts results in additional stresses on railed joints and which, in turn, lead to joint bar failure and resulting derailments.

XXI.

CPR has acknowledged that nuts and bolts are installed using pneumatic torque wrenches which are supposedly pre-set to 550-foot pounds. CPR, however, acknowledges that it does not check, reset, or otherwise verify that its torque wrenches are property set. CPR further acknowledges that occasionally nuts and bolts are installed, reinstalled or serviced using hand tools which do not measure torque, making it impossible to know whether the nuts and bolts are properly torqued.

XXII.

The bolts comprising the joint at mile post 471.65 showed evidence of fretting and were bent, indicative of stress on the joint in the form of longitudinal forces that cause or contribute to joint bar failure and resulting derailments.

XXIII.

The east end of the plug and the west end of the rail at mile post 471.65 both, showed evidence of batter far in excess of that permitted by Defendant CPR and far in excess of what is reasonable. Specifically, batter was not to exceed .015 inches

and at the time of the derailment was between .06 and _19 inches, which is between four times and fourteen times the amount of batter that should cause Defendant CPR to weld the joint into solid rail and which is further indicative of joint stress as well as likely or imminent joint failure and resulting derailments. CPR acknowledges that, notwithstanding this requirement, it failed to measure rail end batter and failed to provide necessary but basic devices to its inspectors for measuring batter

XXIV.

Rail end batter at joints to the degree found following the Minot Derailment develops over time. Therefore, the joint problems were evident for some time prior to the Minot Derailment.

XXV.

Defendant CPR's standards and practices require that adjoining rail and plugs must be fully box anchored at every tie for 195 feet from each joint. The joint at mile . post 471.65 was anchored only at every other tie and the old anchors were reinstalled following the insertion of the plug rather than installing new anchors. Anchors are intended to minimize longitudinal stresses and movement of the track and the installation of only one-half of the number of anchors necessary make more likely, if not inevitable, the failure of the joint and resulting derailments.

XXVI.

Defendant CPR failed to comply with applicable rules, regulations, standards, guidelines and practices including, but not limited to, rules and regulations of the Federal Railroad Administration, applicable provisions of the Code of Federal Regulations, Defendant CPR's own standard practice circulars and industry wide standards. These violations were as the result of and under the direction of the Defendant

CPR's management and were developed, examined, reviewed, implemented, or not, as the case may be, by management of Defendant CPR in Hennepin County, Minnesota with full knowledge that its equipment and personnel were placed in the impossible situation of trying to maintain safe track and train operations with woefully inadequate resources and commitment and that as a consequence, derailments were likely, if not inevitable.

XXVII.

On February 27, 1994, a derailment occurred on Defendant CPR's main line at mile post 477.1, which is approximately 5.5 miles west of the Minot Derailment on the same main line track and also in the Kenmare Section. The February 27, 1994, derailment resulted in a tanker car containing liquid butane bursting into flames and causing serious, permanent, devastating bum injuries to a then 16-year-old boy, and for which Defendant CPR compensated that 16-year-old boy. This derailment shall herein be referred to as the "Burlington Derailment."

XXVIII.

The Burlington Derailment, like the Minot Derailment, was caused by undiscovered fractured joint bars, inadequate inspection, inadequate repair and essentially the same causes as the Minot Derailment.

XXIX.

Investigation of the Minot Derailment concluded numerous irregularities and defective conditions were known prior to, and after, the Burlington Derailment, and certainly before the Minot Derailment. Said deficiencies and irregularities are identical or very similar to the deficiencies and irregularities that caused the Minot Derailment. As a result, Defendant CPR knew or should have known well the consequences of such deficiencies and irregularities as evidenced by the

catastrophic injuries to the 16-year-old boy in the Burlington Derailment.

XXX.

Subsequent to the Burlington Derailment, Defendant CPR instituted a program of welding joints in the Kenmare Section into continuous welded rail. Defendant CPR then discontinued that welding program and, as a result, numerous joints existed in the Kenmare Section and including at least ten joints between mile post 471 and 472 at the time of the Minot Derailment.

XXXI.

Following the Burlington Derailment, Defendant CPR instituted a procedure where hand-held ultrasonic devices were used to identify cracked or broken joint bars. The ultrasonic testing of joint bars was discontinued sometime prior to the Minot Derailment, while at the same time Defendant CPR continued to install additional plugs. Other than walking inspections and ultrasonic testing of joint bars, there is no effective means for inspecting joint bars for cracks and failures. The inspection system used by Defendant CPR at the time of the Minot Derailment and for many years before, was ineffectual, unreliable and known by Defendant CPR to be such. Notwithstanding that information, Defendant CPR failed to implement an effective means of inspection and/or testing of joint bars and elimination of joints in a timely manner by welding.

XXXII.

Prior to the Minot Derailment, Defendant CPR suffered a derailment in 1988 near Bordulac, North Dakota, on the same main line track, which resulted in a derailment of tank cars carrying anhydrous ammonia. This derailment caused the release of large quantities of anhydrous ammonia in a rural area and resultant contamination of air and soil.

XXXIII.

Defendant CPR has experienced three derailments on its main line in North Dakota, each resulting in catastrophic failure of pressurized tank cars, and the release of hazardous and toxic chemicals with resultant serious personal injury and property damage. Yet, it failed to adequately inspect and maintain its track in a conscious disregard to public health and safety with known disastrous consequences and with little or no apparent concern for public safety or property, putting profits ahead of and in place of public safety.

XXXIV.

Defendant CPR, following the Burlington Derailment, reduced its train speeds from 40 miles per hour to 25 miles per hour in the Kenmare Section. Subsequently, in 1998, Defendant CPR eliminated the joints in the main line by welding. Thereafter, Defendant CPR increased the speed of its trains to 40 miles per hour. The increase in speed revealed numerous defects which, in turn, resulted in the insertion of numerous plugs into the main line. At the same time, Defendant CPR decreased welding of joints and discontinued ultrasonic testing which, in turn, created the same situation that existed at the time of the Burlington Derailment, thereby making it inevitable that a subsequent catastrophic derailment would occur again. Even so, Defendant CPR continued to maintain its speed at 40 miles per hour with full knowledge of the risk of catastrophic consequences and that a derailment was almost certain.

XXXV.

The area of the Minot Derailment is "dark territory" which is track that has no system for automatically notifying or warning Defendant CPR if there is a pull-apart, break in the line or other problem. Defendant CPR has "signal territory" for most, if not all, of its other track. Track in "signal territory" which provides an automatic warning of track

separation or failure. By failing to provide signal in the area where the Minot Derailment occurred while, at the same time, reducing manpower, using 100-pound rail, reducing maintenance crews, reducing equipment, reducing inspections, increasing speed, installing numerous temporary joints, reducing welding of joints, eliminating ultrasonic testing, diverting manpower and resources to less critical purposes, and otherwise simply ignoring public safety and good operating practices, Defendant CPR created an unreasonable risk of derailments and resulting injuries and damages.

XXXVI.

Defendant CPR made conscious and deliberate choices and in disregard of known hazards and dangers with known consequences of catastrophic derailments and the resulting likelihood of death, severe personal injury and massive property damage.

XXXVII.

Defendant CPR made its decisions for the sole purpose of increasing profits and compensation of its executives and shareholders and at the expense and detriment of the public's safety, knowing all the while that their acts and omissions were wrongful and/or likely to result in derailments which, in turn, cause death, severe personal injury and massive property damage.

XXXVIII.

Plaintiffs have suffered serious personal injury, property damage, disability, impairment, medical expenses, lost income, lost productive time, unnecessary expenses and services, pain, suffering, economic and non-economic losses, for which they are entitled to compensation, having a value to be determined by the finder of fact.

XXXIX.

Plaintiffs allege that the acts or omissions of Defendant CPR warrant a finding for exemplary or punitive damages as determined by the finder of fact. Defendant CPR is put on notice that leave of court will be sought to amend these pleadings to assert a claim for exemplary or punitive damages

THE PLAINTIFFS REALLEGE ALL ALLEGATIONS SET FORTH PREVIOUSLY IN THIS COMPLAINT AS TO EACH COUNT HEREINAFTER STATED AS THOUGH EACH ALLEGATION WERE SET FORTH IN EACH COUNT

COUNT ONE

I.

The Minot Derailment was directly and proximately caused as a result of the negligence, gross negligence, carelessness, recklessness and willful, wanton, intentional and deliberate acts and omissions of the Defendant CPR.

II.

Defendant CPR acted with willful indifference, and deliberate and conscious disregard for the rights and safety of others by failing to properly inspect, maintain, replace and repair its tracks; by increasing track usage beyond that which the track could reasonably handle; by operating the train at the Minot Derailment in excess of track speed or in excess of a reasonable speed; by refusing to install and maintain signal in the territory; by refusing to adequately provide maintenance crews; improper allocating of resources; inadequate or lack of supervision or direction of employees and equipment; and other acts which caused its equipment to deteriorate into and remain in a defective and dangerous condition in close proximity to populated areas with full knowledge of the consequences of its acts and/or omissions

which included the probability of death, serious personal injury and massive property damage from train derailments.

III.

Defendant CPR is guilty of one or more of the following acts of negligence, carelessness, recklessness, and deliberate acts with willful indifference and reckless and conscious disregard to the rights and safety of others, including the Plaintiffs:

A. Failure to adopt, install, implement, train and enforce a safe method and procedure for the proper inspection, maintenance, upkeep and repair of the tracks, road bed, rails and equipment at the time and location of the Minot Derailment;

B. Failure to properly construct, inspect, maintain and repair the tracks, road bed, rails and other property including equipment and lading;

C. Failure to properly supervise, regulate and operate in North Dakota the safe movement of its engines, cars and lading;

D. Negligent operation of CPR train designated 292-16;

E. Failure to properly construct, inspect, repair and maintain the tracks, including the failure to hire or maintain a sufficient workforce to adequately and safely maintain the tracks when Defendant CPR knew the tracks were carrying hazardous, toxic, explosive, dangerous and ultra-hazardous material on tracks which are near people's homes while knowing that there was a high degree of probability, if not certainty, of death, serious personal injury and/or property damage;

F. Substantially increasing traffic loads on the Kenmore Section, while at the same time

installing numerous plugs or other repairs, curtailing or discontinuing welding and discontinuing use of inspections intended to find cracked or broken joint bars, on track that Defendant CPR knew or should have known could not handle the loads, usage or speeds imposed;

G. Failing to install a signal system which would notify Defendant CPR in the event of breaks or pull-aparts of its track;

H. Discontinuing the use of devices intended to identify cracks or breaks in joint bars;

I. Delaying, severely curtailing or discontinuing welding of joints for unreasonable lengths of time, even in the face of joint problems discovered and known to exist, or which should have been discovered;

J. Knowing of and ignoring, or purposefully ignoring, or implementing procedures and practices which Defendant CPR knew full well would not disclose or would allow dangerous or defective conditions to exist in its track which amount to purposeful avoidance of information affecting public safety and including inadequate training of personnel, non-measurement of rail end batter, inadequate, unmeasured torquing of bolts, excessive spacing between rail end and plug, non-walking inspections, non-use of ultrasonic joint bar testing devices, use of old, worn, deficient rail, improperly reusing rail, mismatching rail height, inadequate anchoring, ignoring bent, damaged nuts and bolts, inadequate or non-existent record keeping, unreasonably delaying of welding of joints, and other acts representing a conscious

disregard of facts or a conscious disregard of the likelihood of facts; and

K. Failing to adopt, implement and comply with necessary and required policies and procedures as required by state and federal law, and further failing to comply with requirements of state and federal law including, but not limited to, requirements of the FRA and CFR.

L. Other acts of negligence, carelessness, recklessness, willful, wanton and intentional and deliberate acts or failure to act which caused the Minot Derailment and, consequently, the damages suffered by the Plaintiffs.

COUNT TWO

IV.

Defendant CPR engaged in, at the time of the Minot Derailment, an ultra-hazardous or extra-hazardous activity, as defined by Minnesota law or the applicable law, and is strictly liable to the Plaintiffs for the damages suffered by the Plaintiffs while engaging in such activity.

COUNT THREE

V.

The Defendant CPR violated applicable state law, both North Dakota and Minnesota, as well as United States law, resulting in the release of hazardous substances and which amount to contamination, pollution, unauthorized release of hazardous material and other violations of applicable "environmental laws" and for which Defendant CPR is strictly liable for damages occasioned thereby, including, but not limited to, personal injury, property damage, statutory

penalties, actual attorney's fees, and other damages as specified in applicable environmental laws.

COUNT FOUR

VI.

The acts and omissions of Defendant CPR created a nuisance by the release of anhydrous ammonia, which damaged the Plaintiffs for which Plaintiffs are entitled to recover damages and all other remedies at law.

COUNT FIVE

VII.

Defendant CPR caused, allowed, or otherwise permitted lading under its exclusive control and direction to trespass onto the property and person of the Plaintiffs, resulting in damages to the Plaintiffs and their property for which Defendant CPR is liable.

COUNT SIX

VIII.

Defendant CPR was engaged in an abnormally dangerous activity: the transportation of hazardous material in populated areas. As such, Defendant CPR is subject to liability for harm to persons and property resulting from such activities even if Defendant CPR exercised the utmost care being strictly liable for damages suffered by the Plaintiffs.

COUNT SEVEN

IX.

Defendant CPR is liable to the Plaintiffs for their damages as the result of CPR's breaches of statutory rules and

regulations including, but not limited to, violations of FRA rules and regulations, violations of the Code of Federal Regulations, violations of Defendant CPR's standard practice circulars and other applicable state or federal law or administrative regulatory agencies of the states of North Dakota and Minnesota and the United States government.,

JURY TRIAL DEMANDED

Plaintiffs demand trial by the maximum number of jurors permitted by law.

PRAYER FOR RELIEF .

WHEREFORE, Plaintiffs pray for relief against Defendant CPR for damages for pain, suffering, disability, impairment, personal injury, property damage, economic and non-economic damages, mental anguish and all other damages proximately caused by Defendant CPR's wrongful acts or omissions for which Plaintiffs are entitled to compensation in an amount exceeding $50,000.00, together with attorney's fees, costs, disbursements herein, and penalties provided by applicable law, and for such other and further relief as the court deems just and equitable.

Dated this 28th day of June, 2004.

BY:
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APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

[Filed Jan. 29, 2004]

CIVIL NO. 03-3093 (ADM/JSM)

MELISSA AND RICHARD ALLENDE,
Plaintiffs,

v.

SOO LINE RAILROAD COMPANY, a Minnesota corporation d/b/a Canadian Pacific Railway, and CANADIAN PACIFIC RAILWAY LIMITED, a Canadian Corporation
Defendants.

REPORT AND RECOMMENDATION

The above matter came on for hearing before the undersigned upon plaintiffs' Motion to Remand [Docket No. 8]. Daniel O'Fallon, Esq. appeared on behalf of the plaintiffs; Timothy Thornton, Esq. and Scott Knutson, Esq. appeared on behalf of defendants. The matter was referred to the undersigned by the District Court for a Report and Recommendation pursuant to 28 U.S.C. § 636 (b)(1)(B).

For the reasons discussed below, it is recommended that plaintiffs' Motion to Remand be granted.

FACTUAL BACKGROUND

On January 18, 2002, defendants were operating a freight train on a single track traveling eastbound. *See* Complaint, ¶ V. Plaintiffs claim that the freight train encountered a "rough patch" of track. *Id.* Subsequently, 31 of the freight train's cars derailed near Minot, North Dakota. *Id.* Seven of

the cars allegedly contained anhydrous ammonia that plaintiffs claim formed a cloud that blanketed the City of Minot, North Dakota, and the surrounding areas. Id. Plaintiffs claim they were exposed to the 2004 anhydrous ammonia that escaped into the air as a result of the freight train's derailment. *Id.* at ¶ IV. Plaintiffs brought an action in Minnesota District Court, Hennepin County, alleging that defendants' negligence resulted in their physical injury and emotional harm. Specifically, plaintiffs assert that the following actions by defendants led to the derailment and release of anhydrous ammonia:

- Failure to adopt, install, implement and enforce a safe method and procedure for the proper inspection, maintenance, upkeep and repair of its tracks, roadbed, property and rails;
- Failure to properly construct, inspect, maintain and repair its roadbed, tracks, rails and properties, including the failure to install appropriate weighted track, failure to weld joints, failure to install permanent joints when wielding would not be possible in a timely fashion, failure to inspect the track on a regular basis using appropriate available technology, such as the KrautKremer device;
- Failure to exercise due care in the operation, inspection, maintenance and repair of tracks:
- Transporting dangerous chemicals on tracks that defendants knew or should have known where dangerous, hazardous and certain to cause derailments; and
- Making the deliberate decision to reduce its workforce at the expense of maintaining its tracks, roadbed, rails and railway system.

See Complaint, ¶ XVI.

Plaintiffs allege no federal statutes as the basis for their

claims or any federal cause of action in their Complaint. Nevertheless, defendants removed plaintiffs' action to the United States District Court, District of Minnesota, under the complete preemption doctrine, relying on two federal statutes, the Federal Railroad Safety Act ("the FRSA") and the Interstate Commerce Commission Termination Act ("ICCTA"), for the basis of the removal. Plaintiffs have brought the present motion to remand to state court on grounds that complete preemption does not exist in this case because the FRSA and ICCTA do not create a private cause of action that replaces the plaintiffs' common law negligence claims.

DISCUSSION

I. Complete Preemption

Under 28 U.S.C. § 1441(b), an action filed in state court may be removed to federal court if the claim is one "arising under" federal law, i.e. arises under the Constitution, treaties or laws of the United States. In determining whether a claim arises under federal law, a court examines "the well pleaded' allegations of the complaint and ignore[s] potential defenses: 'a suit arises under the Constitution and the laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution.'" *Beneficial Nat. Bank v. Anderson*, U.S., 123 S.Ct. 2058, 2062, 156 L.Ed.2d 1 (2003) (quoting *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 53 L.Ed. 126 (1908)) (citation omitted). In other words, the well-pleaded rule requires that federal jurisdiction be present on the face of a properly pleaded complaint in order to invoke the jurisdiction of the federal court. *See Gore v. Trans World Airlines*, 210 F.3d 944, 948 (8th Cir. 2000) (citation omitted).

An exception to the well-pleaded complaint rule is the complete preemption doctrine. *Id.* at 949; *see also Magee v. Exxon Corp.*, 135 F.3d 599, 601 (8th Cir. 1998) (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393, 107 S.Ct.

2425, 2430, 96 L.Ed.2d 318 (1987)). "The complete pre-emption doctrine converts an ordinary state-law claim into a federal claim where 'the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Gore*, 210 F.3d at 948 (quoting *Catepillar Inc.*, 482 U.S. at 393, 107 S.Ct. 2425, quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58. 65, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987)). Under the complete preemption doctrine, "[o]nce an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore, arises under federal law." *Magee*, 135 F.3d at 601 (quoting Caterpillar Inc., 482 U.S. at 393. "Congressional intent is the touchstone of the complete preemption analysis." *Id.* at 601; *see also Minnesota ex rel. Hatch v. Worldcom, Inc.*, 125 F.Supp.2d 365, 369 (D. Minn. 2000) ("'[T]he touchstone of the federal district court's removal jurisdiction is not the 'obviousness' of the pre-emption defense but the intent of Congress.") (quoting *Metropolitan Life*, 481 U.S. at 66, 107 S.Ct. at 1548)).

"When reviewing a motion to remand, a court must resolve all doubts about federal jurisdiction in favor of remand." *Blaylock v. Hynes*, 104 F. Supp.2d 1184, 1186 (D. Minn. 2000) (citing *In re Bus. Men's Assurance Co of Am.*, 992 F.2d 181, 183 (8th Cir. 1993)). "Because of the obvious federalism implications of the complete-preemption doctrine, its application has been extremely limited by the courts." C. Wright, A. Miller, and E. Cooper, 14B Federal Practice and Procedure: Jurisdiction 3d § 3722.1, at 517 (1998). Consequently, it is a conclusion courts reach reluctantly. *Moline Machinery, Ltd. v. Pillsbury Co.*, 259 F. Supp.2d 892, 896 (D. Minn. 2003) (quoting *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 543 (8th Cir. 1996)).

Plaintiffs are seeking damages for personal injury and emotional distress arising out of defendants' alleged negligence under Minnesota common law. Thus, plaintiffs' "well pleaded" complaint, on its face, includes only state law claims. This Court must therefore remand this case to state court unless it can find that the FRSA or ICCTA completely preempts plaintiffs' state law claims.

Defendants claim that plaintiffs' state law claims for negligence are completely preempted by Congress' enactment of the FRSA and the ICCTA, because the statutes so pervasively regulate railroad matters, especially rail safety. . . ." *See* Canadian Pacific Railway's Opposition to Motion to Remand ("Defs.' Memo.") at p. 7. Plaintiffs, on the other hand, argue that neither the FRSA nor the ICCTA completely preempt their action because the statutes do not provide them with a cause of action that replaces their common law negligence claim for personal injuries. *See* Plaintiffs' Memorandum of Law in Support of its Motion to Remand, at p. 9. Defendants cite to *Avco Corp. v. Aero Lodge No. 735, Intern. Ass'n of Machinists and Aerospace Workers*, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968), *Franchise Tax Bd. of State of Cal. v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983), and *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987), in an attempt to counter plaintiffs' assertion that a replacement cause of action is required for complete preemption. In order to address the positions of both plaintiff and defendant, it is necessary to review not only *Avco*, *Franchise Tax Board and Metropolitan Life*, but also the Supreme Court's decisions in *Caterpillar and Beneficial National Bank*.

In *Avco*, the plaintiff filed a suit in Tennessee state court to enjoin its union employees from striking at its plant. 390 U.S. at 558, 88 S.Ct. at 1236. The focus of the complaint was a "no-strike" clause in the collective bargaining agreement,

pursuant to which "grievances" between plaintiff and its union employees were to be settled amicably or by binding arbitration. *Id.* The union removed the case to federal court, citing § 301[1] of the Labor Management Relations Act (the "LMRA") as the basis of federal court jurisdiction. *Id.* at 558-59. 1236-37. The plaintiff subsequently moved to remand the case to state court. *Id.* at 558-59, 1236. The Court found that remand to state court was not appropriate, explaining as follows:

> The starting point is § 301 of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. § 185, which, we held in *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972, was fashioned by Congress to place sanctions behind agreements to arbitrate grievance disputes. We stated: 'We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. * * * The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. . . . Federal interpretation of the federal law will govern, not state law. But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. * * * Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.'
>
> An action arising under § 301 is controlled by federal substantive law even though it is brought in state

[1] Section 301(a) provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. § 185(a).

> court. . . . Removal is but one aspect of "the primacy of the federal judiciary in deciding questions of federal law. [Citations omitted.] It is thus clear that the claim under this collective bargaining agreement is one arising under the "laws of the United States" within the meaning of the removal statute. 28 U.S.C. § 1441(b). It likewise seems clear that this suit is within the "original jurisdiction" of the District Court within the meaning of 28 U.S.C. §§ 1441(a) and (b).

Id. at 559-60, 1237 (quoting *Textile*, 353 U.S., at 456-57, 77 S.Ct., at 917-18).

The *Avco* Court recognized that the "breadth or narrowness of the relief which may be granted under federal law . . . is a distinct question from whether the court has jurisdiction over the parties and the subject matter." *Id.* at 561, 1238. As such, it did not matter to the Court that federal courts were not able to provide injunctive relief in that case. However, the *Avco* Court did recognize that § 301 provided some form of relief to the plaintiff in the form of "specific performance of the promise to arbitrate, to enforcement or annulment of an arbitration award, to an award of compensatory damages." *Id.* (citations omitted).

In *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983), the principle question in dispute was whether the Employment Retirement income Security Act ("ERISA"), permitted state tax authorities to collect unpaid state income taxes by levying on funds that were held in trust for the defendants under an ERISA-covered vacation benefit plan. *Id.* at 4, 2843. The Franchise Tax Board commenced a suit in state court against the defendants seeking damages for defendants' failure to honor the levies and for a declaration that defendants were legally obligated to honor all future levies of the Board. *Id.* at 7, 2845. The defendants removed the case to federal court, and the Franchise Tax Board sought to remand the case back

to state court. The defendants argued that the decision in *Avco* should be applied to ERISA so as to completely preempt the taxing authority's state suit for monetary and declaratory relief. *Id.* at 22-26, 2853-2855. The United States Supreme Court rejected the defendants' argument finding that ERISA did not completely preempt the Board's suit and remanded the case back to state court. In reaching its conclusion, the Supreme Court stated that *Avco* "stands for the proposition that if *a federal cause of action* completely preempts *a state cause of action* any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Id.* at 23-24, 2854 (emphasis added). The Court stated the necessary ground for complete preemption in *Avco* was that "the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization' . . . [such that] [a]ny such suit is purely a creature of federal law. . . ." *Id.* at 23, 2853-54. The Court then found that the Board's action for damages was not completely preempted under ERISA, the Board part, because § 502(a) taken in conjunction with § 502(e)(1),[2] did not provide it with an alternative cause of action to replace the state claim, ("ERISA does not provide an alternative cause of action in favor of the State to enforce its rights, while § 301 expressly supplied the plaintiff in *Avco* with a federal cause of action to replace its preempted state contract claim"), and in part, based on the legislative history of ERISA. Id. at 24-27, 2854-55.

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[2] Section 502(a) describes who is entitled to bring a civil action under ERISA: plan participants, beneficiaries, fiduciaries, the Secretary of Labor, and a state. Section 502(e)(1) states that "[except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, for] fiduciary . . ."

Similarly, in connection with the Board's claim for declaratory relief, the Court stated:

> ERISA carefully enumerates the parties entitled to seek relief under § 502; it does not provide anyone other than participants, beneficiaries, or fiduciaries with an express cause of action for a declaratory judgment on the issues in this case. A suit for similar relief by some other party does not "arise under" that provision.

Id. at 27, 2855.

In *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed2d 55 (1987), a former employee sued his former employer and its insurer in state court alleging claims of breach of contract, retaliatory discharge and wrongful termination of disability benefits. The employer and insurer removed the case to federal court alleging federal question jurisdiction over the disability benefits claim by virtue of ERISA and pendent jurisdiction over the remaining claims. *Id.* at 61, 1545. The Supreme Court found that the employee's state law contract and tort claims were completely preempted by ERISA, and his suit to recover benefits from a covered plan, fell directly under § 502(a)(1)(B) of ERISA,[3] which provided an exclusive federal cause of action for resolution of such disputes. *Id.* at 63, 1546 (citation omitted). In reaching its decision, the Supreme Court stated that "the touchstone of the federal court's removal jurisdiction is . . . the intent of Congress." *Id.* at 66, 1548. It then identified the relevant intent as one "to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal court." *Id.* In search of such

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[3] § 502(a)(1)(B) of ERISA provides: A civil action may be brought—

(1) by a participant or beneficiary—

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan

intent, the *Metropolitan Life* Court noted ERISA's uniquely expansive express preemption clause:

> "'The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.'".

Id. at 65, 1547 (quoting 29 U.S.C. § 1132(f)).

In ascertaining the intent of Congress, the Court also looked to the legislative history of ERISA, and found that this history set out a clear intention to make § 502(a)(1)(B) suits brought by participants or beneficiaries federal questions for the purpose of federal jurisdiction in like manner of § 301 of the LMRA. *Id.* at 66, 1547-1548. In this regard, the Court stated:

> Senator Williams, a sponsor of ERISA, emphasized that the civil enforcement section would enable participants and beneficiaries to bring suit to recover benefits denied contrary to the terms of the plan and that when they did so '[i]t is intended that such actions will be regarded as arising under the laws of the United States, in similar fashion to those brought under section 301 of the Labor Management Relations Act.'

Id. at 66, 1547-48 (quoting 120 Gong. Rec. 29933 (1974)) (citation omitted).

In *Caterpillar*, decided shortly after *Metropolitan Life*, the Supreme Court was again confronted with the issue relating to the preemptive effect of the LMRA. In *Caterpillar*, the dispute arose out of state law breach of employment contract claims involving contracts with individual employees and not their collective bargaining agreement 482 U.S. at 394-95, 107 S.Ct at 2431. Caterpillar removed the case to federal court on grounds that any individual employment contracts were merged into and superceded by the collective bargaining

agreement of the parties, and therefore, were governed by federal substantive law. *Id.* at 390, 2428. Citing to *Metropolitan Life and Franchise Tax Board*, the Supreme Court stated:

> On occasion, the Court has concluded that the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule. Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.

Id. at 393, 2430.

The Supreme Court then concluded that § 301 of the LMRA did not preempt the plaintiffs' individual breach of contract claims, stating, "[S]ection 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement. . . . Section 301 says nothing about the content or validity of individual employment contracts. *Id.* at 394, 2431 (citations omitted). Further, the Court stated:

> [N]ot every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of federal labor law. Claims bearing no relationship to a collective bargaining agreement beyond the fact that they are asserted by an individual covered by such a agreement are simply not pre-empted by § 301. *See also Franchise Tax Board*, 463 U.S. at 25, n. 28, 103 S.Ct. at 2854, n. 28 ('[E]ven under § 301 we have never intimated that any action merely relating to a contract within the coverage of § 301 arises exclusively under that section. For instance, a state battery suit growing out

> of a violent strike would not arise under § 301 simply because the strike may have been a violation of an employer-union contract.')

Id. at 397, 2432 n. 10 (citation omitted).

Finally, in *Beneficial Nat. Bank v. Anderson*, __ U.S. __, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003), the Supreme Court was presented with the issue of whether state "usury violations" alleged in the complaint were completely preempted by the National Bank Act. *Id.* at 2061. In this case, taxpayers made pledges of their anticipated tax refunds to secure short-term loans obtained from Beneficial National Bank, a bank chartered under the National Bank Act. The taxpayers then brought a suit in state court alleging that the bank's interest rates were usurious. *Id.* The bank removed the case to federal court alleging that the National Bank Act preempted the suit.

The Supreme Court analyzed its previous decisions in *Avco, Franchise Tax Board,* and *Metropolitan Life.* With respect to *Metropolitan Life*, it held that removal based on ERISA was proper for two reasons:

> First, the statutory text in § 502(a), 29 U.S.C. § 1132, not only provided an express federal remedy for the plaintiffs' claims, but also in its jurisdiction subsection, § 502(f), used language similar to the statutory language construed in *Avco*, thereby indicating that the two statutes should be construed in the same way. 481 U.S., at 65, 107 S.Ct. 1542. Second, the legislative history of ERISA unambiguously described an intent to treat such actions as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.' *Id.*, at 65-66, 107 S.Ct. 1542 (internal quotation marks and emphasis omitted).
>
> Thus, a state claim may be removed to federal court in only two circumstances--when Congress expressly so

> provides, such as in the Price-Anderson Act, supra, at 2062, or when a federal statute wholly displaces the state-law cause of action through complete pre-emption. When the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law. In the two categories of cases where this Court has found complete pre-emption—certain causes of action under the LMRA and ERISA—the federal statutes at issue provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action. See 29 U.S.C. § 1132 (setting forth procedures and remedies for civil claims under ERISA); § 185 (describing procedures and remedies for suits under the LMRA).

Id. at 2062-2063.

The Court then stated that the dispositive question in the case before it was this. "Does the National Bank Act provide the exclusive cause of action for usury claims against national banks? If so, then the cause of action necessarily arises under federal law and the case is removable. If not, then the complaint does not arise under federal law and is not removable." *Id.* at 2063. The Supreme Court concluded that the National Bank Act did preempt the taxpayers' suit based on the provisions of the Act[4] and the intention of Congress to provide the exclusive cause of action for usury claims against national banks. *Id.* at 2064.

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[4] The Court found that § 85 of the Act explicitly set forth the substantive limits on the rates of interest national banks could charge, and § 86 of the Act set forth the elements of a usury claim, the statute of limitations for such a claim, the remedies available to borrowers who are charged higher rates, and the procedures governing such a claim. *Id.* at 2063.

Taken together, *Avco, Franchise Tax Board, Metropolitan Life, Caterpillar* and *Beneficial National Bank* stand for this: "Whether federal law preempts a state-law cause of action is a question of congressional intent" *Gore*, 210 F.3d at 949 (citation omitted); *see also Agre v. Rain & Hail LLC*, 196 F. Supp.2d 905, 911 (D. Minn. 2002) (citing *Marcus v. AT&T Corp.*, 138 F.3d 46, 54 (2d Cir. 1998)) (the complete preemption doctrine applies only where Congress has clearly manifested an intent to disallow state law claims in a particular field); *Blaylock*, 104 F. Supp.2d at 1187 ("The jurisdictional question concerning 'complete preemption' centers on whether it was the intent of Congress to make the cause of action a federal cause of action and removable despite the fact that the plaintiff's complaint identifies only state claims.") (quoting *Whitman v Raley's Inc.*, 886 F. 2d 1177, 1181 (9th Cir. 1989)). Such Congressional intent has only been found by the Supreme Court in those cases where (1) the federal statute at issue contains some sort of remedial framework for the plaintiffs claim; (2) the plaintiff was eligible to bring a claim under that remedial framework; and (3) Congress has evinced its intent to provide the exclusive cause of action for that claim. However, these cases do not stand for the proposition that the federal law must provide a superseding remedy to replace the state cause of action. To the contrary, such a premise was explicitly rejected by the Supreme Court in Caterpillar where the Court stated:

> The nature of the relief available after jurisdiction attaches, is of course, different from the question of whether there is jurisdiction to adjudicate the controversy. The breadth or narrowness of the relief which may be granted under federal law in § 301 cases is a distinct question from whether the court has jurisdiction over the parties and the subject matter.

Caterpillar Inc., 482 U.S. at 391, 107 S.Ct. at 2429 (quoting *Avco*, 390 U.S. at 561, 38 S.Ct. at 1237-38).

With this framework in mind, this Court must determine whether Congress intended the FRSA or ICCTA to provide the exclusive civil remedy for plaintiffs' negligence personal injury claims.

II. Federal Railroad Safety Act

Defendants allege plaintiffs' claims are completely preempted because the FRSA and regulations arising out of the FRSA address the subject matter of plaintiffs' claims. *See* Defs.' Memo. at p. 13. The FRSA was passed in 1970 "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. Congress also created the FRSA to ensure that railroad safety would be "'nationally uniform to the extent practicable. *Peters v. Union Pacific R. Co.*, 80 F.3d 257, 261 (8th Cir. 1996) (quoting 45 U.S.C. § 434). The FRSA delegates to the Secretary of Transportation the authority to "prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970." 49 U.S.C. § 20103(a).

Defendants point to 49 U.S.C. § 20106 to demonstrate the preemptive force of the FRSA. This provision states:

> Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement.

49 U.S.C. § 20106.

While it is true that the FRSA and its accompanying regulations, provide extensive control over railroad safety, the fact Congress has established an ordered regulatory scheme does not mean that it intended to preempt all state law claims within a particular field. *See Acre*, 196 F. Supp.2d at 911 (citation omitted); *Smith v. GTE Corp.*, 236 F.3d 1292, 1313 (11th Cir. 2001) (finding that FCC regulations standardizing certain aspects of telephone industry insufficient to create complete preemption); *Virgil v. Reorganized M.W. Co., Inc.*, 156 F. Supp.2d 624, 631 (S.D. Miss. 2001) ("Not even Congressional intent to impose a uniform legal standard will necessarily imply its intent to establish complete preemption and hence federal removal jurisdiction.")).

Defendants cite to *Peters v. Union Pacific R. Co.*, 80 F.3d 257 (8th Cir. 1996) and *Rayner v. Smirl*, 873 F.2d 60 (4th Cir. 1989) for the proposition that complete preemption applies to the FRSA.[5] *See* Defs.' Memo. at pp. 11-12. In *Peters*, the

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[5] Defendants have cited to several other cases which they acknowledge arise out of the defensive preemption doctrine, as opposed to the complete preemption context. Nonetheless, defendants claim these cases have bearing on whether the FRSA and its regulations dealing with railway safety are so powerful as to displace entirely any state cause of action. *See* Defs.' Memo. at p. 8 n. 2: *see e.g.*, *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 675 113 S.Ct. 1732, 1743, 123 L.Ed.2d 387 (1993) (finding that that the FRSA regulations on speed limits for trains preempted plaintiff's state negligence claim that the conductor was going too fast.). This Court reaches no decision as to defensive preemption under either the FRSA or the ICCTA as that issue is not before this Court. The "jurisdictional issue of whether 'complete preemption' exists is very different from the substantive inquiry of whether a 'preemption defense' may be established." *Blaylock*, 104 F. Supp.2d at 1187 (citation omitted). "A case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiffs complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar Inc.*, 482 U.S. at 393, 107 S.Ct. at 2430 (emphasis in original) (citation omitted). Moreover, the exclusivity of a statute together with its broad scope, without a federal cause of action that the plaintiff could have plead, is not enough under the

railroad company issued the plaintiff a locomotive engineer certificate, under the the FRSA, which permitted him to operate a locomotive. 80 F.3d at 259 (citation omitted). The railroad company suspended the plaintiffs certificate for violating several locomotive operating regulations. *Id.* The plaintiff filed an action in state court alleging that the railroad company had converted his certificate because it had not returned it after the one-month suspension. *Id.* at 260. The court in Peters noted that pursuant to the FRSA, the Secretary of Transportation had issued preemptive regulations concerning engineer certification including:

> [A] specific, detailed scheme setting out dispute resolution procedures. See 49 C.F.R. §§ 240.401-240.411 (1993). The regulations establish a review board to consider petitions challenging a railroad's denial of certification or recertification, or revocation of certification. 49 C.F.R. § 240.401(a), Any person denied certification can petition the Locomotive Engineer Review Board (Board) to determine whether the denial was improper. 49 C.F.R. § 240.401(a) (1993). Any party adversely affected by the Board's decision has a right of appeal. 49 C.F.R. § 240.411 (1993).

Id. at 261. The Eighth Circuit found that the comprehensive remedial scheme provided by these regulations served to confirm the FRSA's preemptive scope with regards to issues relating to the certification of locomotive engineers. *Id.* (citing *Rayner*, 873 F.2d at 65).

In *Rayner*, the plaintiff alleged that he observed several safety violations and reported them to his superiors. 873 F.2d

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Supreme Court's decisions in *Avco*, *Franchise Tax Board*, *Metropolitan Life*, *Caterpillar* and *Beneficial National Bank* to create complete preemption. *See Aaron v. National Union Fire Ins. Co. of Pittsburgh, Pa*, 876 F.2d 1157, 1165-66 (5th Cir. 1989), *cert. denied*, 493 U.S. 1074, 110 S.Ct. 1121, 107 L.Ed.2d 1028 (1990).

at 62. The plaintiff was subsequently removed from his position as a road foreman and reassigned as a locomotive engineer. Id. The plaintiff alleged that the railroad removed and reassigned him in retaliation for safety complaints he made regarding the operation of the railroad. *Id.* The plaintiff filed suit in state court asserting a wrongful discharge action under Maryland law. Defendants removed the action to federal district court, claiming that the plaintiffs state claim for wrongful discharge was preempted by the FRSA. *Id.* at 62-63. The court disagreed with the plaintiff's assertion that the FRSA had no preemptive effect on his claims because it lacked a remedy, since the amendments to the FRSA in 1980 afforded explicit protection to whistleblowers. *Id.* at 63 (citing 45 U.S.C. § 441(a)). The court in *Rayner*, like the Eighth Circuit in *Peters*, found that "comprehensive remedial scheme for aggrieved railroad employees provided in § 441 serves to confirm its preemptive scope"—

> The parties may petition for a hearing before the National Railroad Adjustment Board and may be represented by counsel. An employee who prevails before the Board may seek enforcement of the Board's order in the federal district courts, and either party may petition the federal district courts for review of the Board's decisions. *See* generally 45 U.S.C. § 153. The specific remedies for wrongfully discharged workers are also set forth. The Board may award backpay to aggrieved railroad employees and may order employers to reinstate discharged or demoted employees to their previous positions. *See* 45 U.S.C. § 441(c)(2).

Rayner, 873 F.2d at 65. The court found that Congress intended the federal remedy in § 441 to supersede state law in dealing with "whistleblowers" because the "specific remedial scheme illustrates a congressional intent that the FRSA remedy for railroad 'whistleblowers' be exclusive." *Id.* (citation omitted).

The difference between the present case and Peters and Rayner is that the FRSA and its regulations explicitly provided remedial schemes for the injuries alleged by the plaintiffs in *Peters* and *Rayner*, whereas in this case, the FRSA and its supporting regulations do not have in place any remedial framework to redress the plaintiff's personal injuries.[6] "To determine whether state-law claims fall within the scope of the provision, a court must first discern whether the plaintiff is eligible to bring a claim under the section." *Blaylock*, 104 F. Supp. 2d at 1188 (citation omitted). *See also State of Minn. by Ulland v. International Ass'n of Entrepreneurs of America*, 858 F. Supp. 937, 942 n. 9 (D. Minn. 1994) (citing Franchise Tax. Bd., 463 U.S. at 26, 103 S.Ct. at 2855) ([It is] "important for the purposes of complete preemption to determine whether [federal law] provides an alternative cause of action for any state laws claims it might preempt."); *Johnson v. Baylor Univ.*, 214 F.3d 630, 632 (5th Cir.) *cert. denied*, 531 U.S. 1012, 121 S.Ct. 567, 148 L.Ed.2d 486 (2000) (finding that to establish complete preemption, the party claiming preemption must show that "the statute contains a civil enforcement provision that creates a cause of action that both replaces and protects the analogous area of state law . . . ") (citing *Heimann v. Nat'l Elevator Ind. Pension Fund,* 187 F.3d 493, 501 (5th Cir. 1999)); *Kelley v. Norfolk & Southern Railway Co.*, 80 F. Supp.2d 587, 590 n. 3 (S.D.W.V. 1999) (citation omitted) ("If the Court finds that [the FRSA] does in fact provide Kelley a remedy, the Court has no doubt that Kelley's claims for intentional infliction of emotional distress would be preempted.").

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[6] In fact, defendants are not claiming that plaintiffs would have a FRSA-created cause of action for the facts they allege. *See Hurt v. Dow Chemical Co.*, 963 F.2d 1142, 1144 (8th Cir. 1992) (finding that the Federal Insecticide, Fungicide, and Rodenticide Act ("FLFRA") did not completely preempt state claims as it did not create a cause of action for the facts pled by the plaintiff and "no one claims that plaintiff would have a FLFRA-created cause of action for the facts she alleges.")

Moreover, this Court can find no suggestion in the legislative history of the FRSA that Congress intended to create a cause of action on behalf of third parties injured by a railroad's violation of the safety rules and regulations promulgated by the Secretary of Transportation pursuant to the FSRA. *See* H.R. Rep. 91-1194, U.S. Code Cong. & Admin. News 1970. To the contrary, while the legislative history of the FRSA is permeated with references to railroad safety, descriptions of horrific injuries caused by railroad accidents (including derailments resulting in the spillage or explosions of hazardous materials), and the need for national and uniform regulations to prevent such accidents (*see e.g.*, H.R. Rep. 91-1194, U.S. Code Cong. & Admin. News 1970, pp. 4105-4108), it is clear that the focus of the FRSA is on the regulation and control of railroads for the purpose of preventing future accidents, and not on the provision of a mechanism or a remedy to redress those persons who are the victims of an accident. Consequently, to the extent that the legislative history of the FRSA discusses the enforcement of and remedies for violation of the Act, it is limited to the Secretary of Transportation's or individual state's authority to seek compliance with the Secretary's regulations through the assessment of penalties or requests for injunctive relief against any railroad which violates. *See* H.R. Rep. 91-1194, U.S. Code Cong. & Admin. News 1970, pp. 4109-4111, 4112-4113, 4118-4121.

Therefore, based on the language of the FRSA and the legislative history leading up to its enactment, this Court does not find that Congress intended for the FRSA to provide the exclusive cause of action for plaintiffs' claims. Since the FRSA does not completely preempt plaintiffs' claims, it cannot form the basis of removal of this case to federal court.[7]

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[7] Defendants' arguments that 49 U.S.C. §§ 21301-21303 provide an enforcement mechanism to persons injured as a result of an accident involving a railroad are without merit. Sections 21301-21303 only provide

III. Interstate Commerce Commission Termination Act

Defendants claim that based on the express language of the ICCTA, this Act completely preempts plaintiffs' state negligence claims for personal injury and emotional distress resulting from the train derailment. It is true that the ICCTA provides that its purpose, in part, is to promote safe rail transportation. *See* 49 U.S.C. § 10101(3), (8)).[8] In addition, under § 1121(a)(1) of the ICCTA, the Surface Transportation Board ("STB"), to whom the regulation of a railroad's operations have been delegated pursuant to the ICCTA, "may require a rail carrier to provide facilities and equipment that are reasonably necessary to furnish safe and adequate car service if the Board decides that the rail carrier has materially failed to furnish that service." 49 U.S.C. § 1121(a)(1).

Further, 49 U.S.C. § 11704 (a) and (b) state:

> (a) A person injured because a rail carrier providing transportation or service subject to the jurisdiction of the Board under this part does not obey an order of the Board, except an order for the payment of money, may

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that violations of the FRSA will result in civil penalties payable to the United State Government. It provides no civil enforcement mechanisms to those injured as a result of a violation of the FRSA or its supporting regulations.

[8] 49 U.S.C. § 10101 provides in relevant part:

> In regulating the railroad industry, it is the policy of the United States Government—
>
> * * *
>
> (3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;
>
> * * *
>
> (8) to operate transportation facilities and equipment without detriment to the public health and safety . . . .

bring a civil action in a United States District Court to enforce that order under this subsection.

(b) A rail carrier providing transportation subject to the jurisdiction of the Board under this part is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this part. A rail carrier providing transportation subject to the jurisdiction of the Board under this part is liable to a person for amounts charged that exceed the applicable rate for the transportation.

49 U.S.C. § 11 704 (a)-(b).

Finally, under the ICCTA, the jurisdiction of the STB, pursuant to 49 U.S.C. § 10501(b), extends over:

(1) [T]ransportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.[9]

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[9] With regards to the express preemption clause contained in 49 U.S.C. § 10501(b)(2), courts have found that "'[i]t is difficult to imagine a broader statement of Congress' preemption intent to preempt state regulatory authority over railroad operations.'" *See Soo Line Railroad Co. v. City of Minneapolis*, 38 F. Supp.2d 1096, 1099 (D. Minn. 1998) (finding that summary judgment in favor of the defendant was appropriate because the ICCTA expressly preempts a city's authority to withhold demolition permits) (quoting *CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n*, 944

49 U.S.C. § 10501(b) (emphasis added).

This Court agrees that some state law claims are completely preempted by the ICCTA, in part based on these various provisions of the Act, and in part, based on the legislative history of the statute. In this regard, the House Committee Report on the ICCTA provides:

> This provision [referring to the express preemption clause] is conformed to the bills' direct and general preemption of State jurisdiction over economic regulation of railroads. As used in the this section 'State of Federal law' is intended to encompass all statutory, common law, and administrative remedies addressing the rail-related subject matter jurisdiction of the Transportation Adjudication Panel.

H.R. Rep. 104-311 (1995) (emphasis added).

Nevertheless, while the ICCTA does refer to safety under § 10101(3) and (8), contains an explicit preemption provision for those remedies covered by the Act, 49 U.S.C. § 10501(b)(2), and includes an explicit enforcement provision for certain types of claims, 49 U.S.C. § 11704 (a) and (b), this Court finds that there is no complete preemption in this case because none of plaintiffs' claims are covered by the remedial or enforcement mechanisms provided by the Act. The ICCTA does not contain civil enforcement procedure for plaintiffs

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F. Supp. 1573, 1581 (N.D. Ga. 1996)); *see also Columbiana County Port Authority v. Boardman Township Park District*, 154 F. Supp.2d 1165, 1180 (N.D. Ohio 2001) ("The courts that have considered the preemption issue following ICCTA's enactment have consistently found that the foregoing preemption clause is both clear and broad . . . It is clear that the ICCTA has preempted all state efforts to regulate rail transportation.") (citations omitted); *Guckenberg v. Wisconsin Central Ltd.*, 178 F. Supp.2d 954, 958 (E.D. Wis. 2001) ("Indeed, the language is 'clear and broad,' and it is apparent that the "ICCTA has preempted all state efforts to regulate rail transportation.") (quotation omitted).

similar to section 502 of ERISA, 29 USCA § 1132, or section 301 of the LMRA, 9 U.S.C.A. § 185(a). *See City of Laredo v. Texas Mexican Ry. Co.*, 935 F. Supp. 895, 898 (S.D. Tex. 1996). Rather, "[u]nder the statute, a person may file suit in federal court only to enforce an order of the Board, to recover overcharges or to recover under a bill of lading." *Id.* (citing 49 U.S.C. §§ 11704(a); 11705(a), (e): and 11708(d)); *see also DeBruce Grain. Inc. v. Union Pacific R, Co.*, 983 F. Supp 1280, 1284 (W.D. Mo. 1997), *affd*, 149 F.3d 787 (8th Cir. 1998) ("[T]here is no provision governing the filing of a civil action for damages other than with respect to the right to recoup charges or to enforce the board's orders."). As such, there is nothing in the ICCTA that permits a person to file a suit in federal court to recover damages for personal injury resulting from the action of a railroad governed by the ICCTA.

Consequently, defendants reliance on *Deford v. Soo Line R. Co.*, 867 F.2d 1080 (8th Cir. 1989) and *Grantwood Village v. Missouri Pacific R. Co.*, 95 F.3d 654 (8th Cir. 1996), and *South Dakota ex rel. South Dakota R.R. Authority v. Burlington Northern & Santa Fe Ry. Co.*, 280 F. Supp.2d 919 (D.S.D. 2003), for the proposition that the ICCTA completely preempts plaintiffs' negligence claims, is misplaced.

In *Deford*, the defendant agreed to sell a portion of its rail lines. 867 F.2d at 1082. To comply with the Interstate Commerce Act ("ICA"), the predecessor to the ICCTA, the defendants were required either to obtain approval for the sale by the Interstate Commerce Commission ("ICC"), the predecessor to the STB, or receive an exemption. *Id.* The exemption was granted over the objections of labor organizations. *Id.* Subsequently, railroad employees adversely affected by the sale of a portion of a railroad brought an action against their railroad employer claiming common law creditors' rights violations and violation of the Minnesota Uniform Fraudulent Transfer Act. *Id.* at 1082-83. The Eighth Circuit found that

both state claims were completely preempted by the ICA. In so finding, the court noted that the ICA required the railroad to obtain permission from the ICC, which could place labor protective agreements on the railroad, before it acquired or obtained a railway line. *Id.* at 1088 (citation omitted). The Eighth Circuit also noted that ICC provided a forum for the plaintiffs' complaints and possible relief. *Id.* at 1090.

Grantwood, involved an abandonment under the ICA, in which one party filed a request for interim use during abandonment proceedings before the ICC. 95 F.3d at 656. The ICC granted a notice of interim use and the parties reached an agreement regarding trail use within the time provided by the ICC. Id. A subsequent quiet title action raised the question of whether the trail use agreement precluded abandonment and reversion to the owners of the underlying property. The Eighth Circuit held that removal of the case from state court was proper given that the suit amounted to a collateral attack on the ICC's allowance for interim trail use and that the ICC's authorization of such trail use precluded a finding that the right of way had been abandoned under state law. *Id.* at 657.

In *South Dakota ex rel. South Dakota R.R. Authority*, the State of South Dakota, by and through the South Dakota Railroad Authority ("SDRA"), filed suit for specific performance and injunctive relief arising out a contract, which allowed the SDRA and its designees to utilize a portion of the defendant's interchange access line. *Id.* at 923. In addition, the complaint sought damages for breach of contract and tortious interference with a business relationship. *Id.* The court found that the plaintiffs were seeking "state contract and tort remedies arising out of contracts which were previously approved by the ICC and the STB pursuant to federal law." *Id.* at 929. In finding complete preemption, the court noted that the ICCTA authorized the STB to regulate the contracts at

issue and that contracts arose out of federal law and policy. *Id.* at 932.[10]

These three cases demonstrate that in some instances complete preemption of state actions is proper under the ICCTA. In Deford, complete preemption from employee claims was proper as the railroad had complied with the ICA and obtained an exemption from regulation relating to its sale of a rail line. In Grantwood, removal was proper because the state action amounted to a collateral attack on the ICC's authorization of trait use precluded a finding that the right of way had been abandoned under state law in South Dakota ex rel.

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[10] Defendants also cite to several cases dealing with defensive preemption, which they claim allegedly show that negligence actions are preempted by the ICCTA. In *Friberg v. Kansas City Southern Ry. Co.*, 267 F.3d 439 (5th Cir. 2001), the plaintiffs, who operated a nursery, brought a negligence action against the railroad claiming a loss in business because their customers were required to wait for long periods in getting to their nursery when the primary access road was blocked by waiting trains. *Id.* at 441. The plaintiffs had brought common law state claims of negligence and negligence per se for the defendant's violation of Texas' Anti-Blocking Statue. *Id.* at 441-42. In finding preemption, the court emphasized the goal of uniformity in railroad operations and that it was Congress' apparent intent that the ICCTA further that goal at (east as to the economic realm. *Id.* at 443-44. *See also Guckenberq*, 178 F. Supp.2d at 956 (finding common law nuisance claims brought by plaintiff, regarding the construction of tracks by their home, preempted under the ICCTA since the STB has exclusive jurisdiction, and provided the exclusive remedies, regarding the construction and operation of side tracks); *City of Auburn v. United States Government*, 154 F.3d 1025, 1027-28 (9th Cir. 1998) (finding that the local environmental review for a rail line acquisition was preempted by the ICCTA because 10501(b) gave the STB exclusive jurisdiction authority over the acquisition of rail tracks). Although these cases make it clear that economic regulations as to the acquisition, construction, and operation of rail tracks are within the purview of the STB, they do not provide any guidance as to whether the issue of rail safety falls under the jurisdiction of the STB. *See e.g., Friberg*, 267 F.3d at 444 (noting that the court was not ruling on whether the ICCTA precludes state regulation of safety).

removal was appropriate because it pertained to complete preemption over contracts approved and regulated by the STB. Nevertheless, all three cases are distinguishable from the present case in that there has been no assertion by the defendants that plaintiffs are using their lawsuit to usurp previous actions of the STB pertaining to them. Moreover, none of these decisions address the issue before this Court. Whether the ICCTA completely preempts personal injury claims premised on state common-law negligence claims.

Further, the legislative history of the ICCTA and the STB support plaintiffs' contention that the ICCTA does not preempt plaintiffs' state negligence claims for personal injury and emotional distress resulting from the train derailment.

In 1887, Congress enacted legislation to regulate commerce, which crated the Interstate Commerce Commission ("ICC"). See S. Rep. 104-176, 1995 WL 701522 at *2 (1995). The ICC was initially created "to protect shippers from the monopoly power of the railroad industry." *Id.* The ICC's regulatory authority over railroad companies was subsequently expanded. *Id.* By the 1960's, the ICC's regulatory structure was considered burdensome and restrictive and the federal government created new agencies to deal with emerging transportation problems. *Id.* at *3. "In 1967, the DOT was created and virtually all of the ICC's safety oversight functions were transferred to the new agency. However, economic regulation remained at the ICC." *Id.*

By 1970, despite the ICC's continued broad regulatory powers, the country's railroads were falling into bankruptcy. Id. In 1977, noting the ineffectiveness of the ICC, President Jimmy Carter created a task force that was charged with streamlining the ICC and deregulation. *Id.* As a result, Congress enacted the Railroad Revitalization and Regulatory Reform ("4R") Act of 1976, which provided increased flexibility for rail carriers to raise or lower rates to conform to market forces. *Id.* In 1980, Congress enacted the Staggers

Rail Act, providing the rail industry with many of the same market freedoms available to other competitive industries including removing antitrust immunity over collective rate-making, reducing rail rate regulation, and easing the way for mergers. *Id.* The ICCTA, enacted in 1995, eliminated the ICC and transferred its duties to the STB". Id. at *5. The ICCTA was not an attempt to substantively change rail regulation. *Id.* at *6. Instead, the ICCTA was meant to "preserve the careful balance put in place by the 4R Act and the Staggers Act that led to a dramatic revitalization of the rail industry while protecting significant shipper and national interests." *Id.* The ICCTA was meant to retain those provisions needed to preserve an efficient national rail network comprised of numerous individual carriers including:

> Federal regulatory oversight of line constructions, line abandonments, line sales, leases, and trackage rights, mergers and other consolidations (under a broad public interest standard and with ongoing regulatory oversight), car supply and interchange, antitrust immunity for certain collective activities (including pooling of equipment and services), competitive access, financial assistance, feeder line development, emergency service orders, and recordation of equipment liens.

Id. at *6-7. In addition, the ICCTA was to maintain provisions that are necessary to protect rail shippers. *Id.* at *7. "These include the common carrier obligation, regulatory oversight of the reasonableness of rail practices, maximum rate regulation for captive traffic, advance notice of rate increases, and rate tariffs for agricultural commodities and fertilizer." *Id.*

There is no mention in the legislative history that the purpose of the ICCTA was to provide oversight for the safety of rail lines. To the contrary, the Senate Report's impact statement provides that:

> A wide variety of businesses and consumers would be covered and potentially impacted by this bill. They include rail carriers, certain pipeline carriers (those transporting commodities other than oil, gas, or water), trucking companies, intercity bus companies, water carriers, freight forwarders, and transportation brokers, and their various customers. Government employees who work for the ICC and FMC would also be affected by this bill.

Id. at *17.

The Report contains no language to suggest that residents in areas surrounding rail lines who sustain personal injuries from a railroad's unsafe operation of its trains, would be affected by this legislation. In sum, the legislative history of the ICCTA supports the position that the focus of the ICCTA and the STB is on economic regulation of rail transportation and not the regulation of railway safety. "Although states retain the police powers reserved by the Constitution, the Federal scheme of *economic regulation and deregulation* is intended to address and encompass all such regulation and to be completely exclusive." H.R. Rep. No. 104-311.

Moreover, a finding by this Court that the ICCTA and the STB has exclusive jurisdiction over the safety of the railways would run contrary to the FRSA. Congress enacted the Federal Railroad Safety Act in 1970 "to promote safety in all areas of railroad operations." 45 U.S.C. § 421. In order to achieve this goal, "the Act authorized the Secretary of Transportation to 'prescribe, as necessary, appropriate rules, regulations, orders and standard for all areas railroad safety.'" *Burlington Northern Railroad Co. v. State of Minnesota*, 882 F.2d 1349, 1351 n. 5 (8th Cir. 1989) (quoting 45 U.S.C. § 431). The Secretary of Transportation has delegated this authority to the Federal Railroad Administrator ("FRA"). *Id.* (citing 49 C.F.R. § 1.49(m) (1988)).[11] As such, a finding by

[11] 49 C.F.R. § 1.49 provides in relevant part:

this Court that the STB has the exclusive jurisdiction over train safety, would be in direct conflict with Congress' delegation to the Secretary of Transportation (and by the Secretary, to the FRA), the authority over railroad safety.

"A primary rule of statutory construction is that when a court interprets multiple statutes dealing with a related subject or object, the statutes are *in pari material* and must be considered together." *Linquist v. Bowen*, 813 F.2d 884, 888 (8th Cir. 1987) (citing *United States v. Freeman*, 44 U.S. (3 How.) 556, 564-65, 11 L.Ed. 724 (1845)). A proper analysis "reads the parts of a statutory scheme together, bearing in mind the congressional intent underlying the whole scheme." *Id.* at 889 (citations omitted). "While the STB must adhere to federal policies encouraging 'safe and suitable working conditions in the railroad industry,' the 1CCTA and its legislative history contain no evidence that Congress intended for the STB to supplant the FRA's authority over rail safety." *Tyrrell v. Norfolk Southern Rv. Co.*, 248 F.3d 517. 523 (6th Cir. 2001) (citation omitted). Instead, the "agencies' complementary exercise of their statutory authority" demonstrates Congress intent for the ICCTA and the FRSA to be construed *in pari material*. *Id.* The STB and the FRA in their 1998 Safety Integration Plan rulemaking recognized that their joint responsibility for promoting rail safety, but at the same time found that "the FRA exercised primary authority over rail safety matters under 49 U.S.C. § 20101 *et seq.*, while the STB handled economic regulation and environmental impact assessment." *Tyrrell*, 248 F.3d at 523 (citing Regulations on Safety Integration Plans Governing Railroad Consolidations,

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The Federal Railroad Administrator is delegated authority to—

* * *

(m) Carry out the functions vested in the Secretary by the Federal Railroad Safety Act of 1970 (Title II of Pub.L. 91-458); 84 Stat. 971, 45 U.S.C. 421 *et. seq.*). . . .

Mergers, and Acquisitions of Control; and Procedures for Consideration of Safety Integration Plans in Cases Involving Railroad Consolidations, Mergers, and Acquisitions of Control, STB Ex Parte No. 574, FRA Docket No. SIP-1, Notice No. 1, 63 Fed. Reg. 72,225 (Dec. 31, 1998)).[12]

As stated previously, the ICCTA provides that its purpose, in part, is to promote safe rail transportation. 49 U.S.C. § 10101(3), (8). Section 10101 establishes "the basic policy directive against which all of the statutory provisions the Board administers must be evaluated." *See* Final Rule, STB Ex Parte No. 574, FRA Docket No. 1999-4985. This policy applies to every transaction under the STB's jurisdiction. *Id.* However, 49 U.S.C. § 10101 does not establish on its face that the STB has exclusive jurisdiction over safety; only that it must consider issues of safety in transactions under its jurisdiction. In sum:

> Based on the federal railway statutes, the STB and FRA's jurisdictional management, and the resulting regulatory systems, Congress 'vested the FRA with primary authority over national rail safety policy and assigned the STB the duty to encourage 'safe and suitable working conditions' for railway employees through its assessment of individual railway proposals subject to its authority.

Tyrrell, 248 F.3d at 523.

Finally, in determining the jurisdiction of the STB, it is also helpful to look at the agency's own understanding of its jurisdiction under the ICCTA. According to the STB, the

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[12] *See also* Regulations on Safety Integration Plans Governing Railroad Consolidations, Mergers, and Acquisitions of Control; and Procedures for Consideration of Safety integration Plans in Cases Involving Railroad Consolidations, Mergers, and Acquisitions of Control, STB Ex Parte No. 574, FRA Docket No. 1999-4985, Notice No. 4 (Mar. 8, 2002) ("Final Rule, STB Ex Parte No. 574, FRA Docket No. 1999-4985").

functions it retained over rail regulation pursuant to 1995 enactment of the ICCTA are as follows:

> Common Carrier Obligation. Exemptions. Rail Mergers. Line Transfers, Leases, and Trackage Rights. Line Sales to Noncarriers. Labor Protection. Rate Regulation for Common Carriage, including: Public Disclosure of Rates and Service Terms. Advance Notice of Rate Increases or Changes in Service Terms. Maximum Rate Reasonableness for Captive Traffic. Contracts for Transportation of Agricultural Products requirements, including: Filing of Summaries. Protest and Matching Rights. Equipment Limitations. Rail Cost Adjustment Factor (RCAF) Computation. Reasonableness of Practices. Rate Discrimination Car Supply and Interchange. Emergency Service Orders. Competitive Access. Line Constructions, including Line Crossings. Line Abandonments, including: Financial Assistance. Rails-to-Trails. Public Use Provision for Right-of-way. Feeder Line Development Program. Collective Ratemaking (and Antitrust immunity) InterLocking Officers and Directors Recording Liens. Data Collection and Oversight[]

See Surface Transportation Board,- Who's Who and What Does it Do?, *available at* http:/lwww.stb.dot.gov/Publications/whoswho.htm#Functions. Based on this list of retained functions, it cannot be gleaned that the STB believes it has retained jurisdiction over railway safety or accidents involving railroads. Moreover, according to the STB, "[i]n the performance of its functions, the Board is charged with promoting, where appropriate, substantive and procedural regulatory reform in the economic regulation of surface transportation, and with providing an efficient and effective forum for the resolution of disputes." *Id.* It is apparent that the STB believes that it is charged with economic, and not safety, regula-

tion of surface transportation.[13] Given the requirement that the ICCTA and the FRSA must be construed *in pari material*, the STB's perception of its own jurisdiction, and the legislative history of the ICCTA, this Court finds that rail safety does not fall under the primary jurisdiction of the STB.

For all of these reasons, a finding that the ICCTA completely preempt plaintiffs' personal injury negligence claims is not appropriate in this case.

IV. Plaintiffs' Request for Attorneys' Fees and Costs

Under 28 U.S.C. § 1447(c), "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Under the language of Section 1447(c), the Court has discretion to order the payment of costs and attorneys' fees. *See Moline*, 259 F.Supp.2d at 905. While this Court concludes, and recommends, that remand is necessary in this case, the question appears to be one of first impression in this Circuit, and presents a close question. Therefore, as an exercise of discretion, this Court recommends that plaintiffs' request for an award of attorneys' fees and costs be denied.

V. Conclusion

This Court finds that neither the FRSA nor the ICCTA completely preempt plaintiffs' personal injury negligence claims. The FRSA and its accompanying regulations, provide extensive control over railroad safety. However, defendants have not cited to, nor has this Court been able to find, any part of FRSA, or its accompanying regulations, that provide plaintiffs with a mechanism to redress the harms they have

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[13] The STB's interpretation of its jurisdiction of the ICCTA is supported by the legislative history surrounding the ICC, the predecessor to the STB. In 1967, the ICC had virtually all of its regulatory authority over railroad safety transferred to the Department of Transportation, while it retained jurisdiction over economic regulation.

allegedly suffered. In addition, there is nothing within the legislative history of the FRSA that demonstrates Congress' intent to completely preempt personal injury claims resulting from the actions of railroads.

As for the ICCTA, it, like the FRSA, does not contain a mechanism for the plaintiffs to address the harms they have sustained. The ICCTA's power lies with the authority of STB whose primary function pertains to the economic regulation and not the regulation of safety of railroads. Further, the legislative history of ICCTA undermines any assertion that plaintiffs' personal injury claims are preempted under this statute.

Since the FRSA and the ICCTA do not completely preempt plaintiffs claims, this case should be remanded to state court.

RECOMMENDATION

For the reasons set forth above, it is recommended that:

1. Plaintiffs' Motion to Remand [Docket No. 8] be GRANTED, and that matter be remanded to the Minnesota District Court, Fourth Judicial District; and

2. Plaintiffs' request for attorneys' fees and costs be DENIED.

Dated: January 29, 2004

/s/ JANIE S. MAYERON
Janie S. Mayeron
United States Magistrate Judge

Pursuant to Local Rule 72.1(c)(2), any party may object to this Report and Recommendation by filing with the Clerk of Court, and by serving upon all parties on or before February 13, 2004 a copy of this Report, written objections which specifically identify the portions of the Report to which objections are made and the bases for each objection.

Unless the parties stipulate that the District Court is not required by 28 U.S.C. § 636 to review a transcript of the hearing in order to resolve all objections made to this Report and Recommendations, the party making the objections shall timely order and file a complete transcript of the hearing on or before February 13, 2004.*

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* *See* S. Rep. 104-176, 1995 WL 701522 at *3.

APPENDIX C

[FILED 05 DEC 21]

STATE OF MINNESOTA COUNTY OF HENNEPIN	DISTRICT COURT FOURTH JUDICIAL DISTRICT CASE TYPE: Personal Injury
In re the Soo Line Railroad Company Derailment of January 18, 2002 in Minot, ND	Court File No. 04-007726

MEMORANDUM OF LAW
REGARDING CHOICE OF LAW

I. INTRODUCTION

Defendants from the January 18, 2002 derailment outside Minot, North Dakota have moved this Court for partial summary judgment on choice of law. This Court has issued an order granting Defendants' motion to apply the substantive laws of North Dakota to all actions arising out of the January 18, 2002 derailment outside of Minot, North Dakota. This Memorandum memorializes this Court's rationale for granting Defendants' motion.

II. APPEARANCES:

J. Gordon Rudd, Esq., Zimmerman Reed, P.L.L.P., 651 Nicollet Mall, Suite 501, Minneapolis, MN 55402, Mike Miller, Esq., Solberg, Stewart, Miller, Johnson, Tjon, Kennelly and O'Keeffe, LTD., 1129 5th Avenue South, P.O. Box 1897 Fargo, ND 58107, George G. Eck, Esq., Dorsey & Whitney LLP, 50 South Sixth Street, Suite 1500, Minneapolis, MN 55402, Kristy L. Albrecht, Esq., Benjamin Hasbrouck, Esq., Dorsey & Whitney LLP, 51 North Broadway, Suite 402, Fargo, ND 58102, Ronald J. Barczak,

Paula M. Jossart, Yaeger, JungBauer, Barczak & Vucinovich, 745 Kasota Av[illegible], Minneapolis, MN 55414, Daniel A. O'Fallon, Robin[illegible] Kaplan, Miller & Ciresi, L.L.P., 2800 LaSalle Plaza, 800 LaSalle Avenue South, Minneapolis, MN 55402-2015, Richard G. Hunegs, Steven M. Hunegs, Randal W. LeNeave, Hunegs, Stone, LeNeave, Kvas & Thornton, P.A., 1650 International Centre, 900 Second Avenue South, Minneapolis, MN 55402, and Gregory N. McEwen, McEwen Law Firm, Ltd., 1600 Pioneer Building, 336 N. Robert Street, Saint Paul, MN 55101, appeared on behalf of the moving plaintiffs (hereinafter, "Plaintiffs").

Timothy R. Thornton, Esq., Scott G. Knudson, Esq., Thomas J. Basting, Jr., Esq. and Kevin M. Decker, Esq., Briggs and Morgan, 2200 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402, appeared on behalf of Defendants Canadian Pacific Railway Company, Canadian Pacific Limited, Canadian Pacific Railway Limited, Soo Line Railroad Company, Terry Kroll, and Michael Hanson (hereinafter, "Railroad Defendants").

III. FACTS AND PROCEDURAL POSTURE

A. The derailment.

These cases involve events that took place in the early morning hours of January 18, 2002, when a train owned by Canadian Pacific Railway, on its way from Edmonton, Alberta to St. Paul, Minnesota, derailed outside of the city of Minot, North Dakota.

> The derailment occurred at approximately 1:39 a.m., when a Canadian Pacific Railway freight train with 2 locomotives and 112 cars derailed 31 freight cars near Minot, North Dakota. Seven of 15 cars that were carrying anhydrous ammonia catastrophically failed, creating a vapor plume about 5 miles long, and 2 1/2 miles wide, which affected approximately 15,000 residents near the derailment site and a portion of the city of Minot.

NTSB Press Release, June 28, 2002.

The accident "resulted in one fatality, over 300 injuries and the displacement of residents for up to 30 days." Id. It is undisputed that the fatality mentioned in the preceding quote is John T. Grabinger.

B. The ensuing litigation.

Since January 18, 2002 almost two-hundred separate lawsuits have been filed by North Dakota residents claiming they were injured by the toxic cloud. In addition, there are two class-action cases currently pending. Approximately 160 of the individual cases were consolidated before the undersigned by Order of Judge Kevin Burke dated June 18, 2003. This Court has also been assigned one of the two class-action cases stemming from the derailment. This Court has stayed that class action. The other class action is pending in the Federal District Court of North Dakota.

Early in the litigation Plaintiffs indicated that they intended to move for leave to add a claim for punitive damages. This Court has, concurrent with this Court's decision herein, denied Plaintiffs' motion, regarding punitive damages, under both North Dakota and Minnesota law. It should be noted that there are significant substantive differences between North Dakota and Minnesota punitive damages law. For instance, North Dakota tort reform efforts have capped punitive damages awards at "two times the amount of compensatory damages or two hundred fifty thousand dollars, whichever is greater." N.D.C.C. § 32-03.2-11(4). Minnesota, on the other hand, has no such statutory cap. *See* Minn. Stat. § 549.20. A second difference is that the threshold a plaintiff has to meet in order to add a claim for punitive damages is higher under North Dakota law. In North Dakota, a plaintiff must prove by clear and convincing evidence that the defendant acted with oppression, fraud, or actual malice. *See* N.D.C.C. § 32-03.2-

11(1). In contrast, Minnesota law requires a plaintiff to prove by clear and convincing evidence that the defendant acted with deliberate disregard of the plaintiff's rights. Minn. Stat. § 549.20, subd. I.

The Railroad Defendants moved for summary judgment on the choice of law question. The Railroad Defendants argue that North Dakota's interest in this litigation overwhelm any interest Minnesota might have. In fact, the Railroad Defendants assert that Minnesota's policy against forum shopping overcomes any interest that Minnesota might have in applying its punitive damages law, and further that constitutional limitations on punishing out-of-state conduct precludes Minnesota from applying its punitive damages law to the out-of-state conduct that underlies this litigation.[1]

Plaintiffs argue that the law of the forum must apply because punitive damages are merely a remedy and thus not subject to a choice of law analysis. Plaintiffs further assert that Minnesota law should apply even under choice of law analysis because: (1) the Soo Line Railroad Company, one of the Railroad Defendants, was incorporated in Minnesota and has strong historic ties to Minnesota; (2) the corporate conduct giving rise to the motion to add a claim for punitive damages occurred in Minnesota; and (3) Minnesota has a strong interest in compensating tort victims.[1]

C. The situs of the Railroad Defendants' activities.

The place where relevant activities took place is important to the choice of law consideration.

The accident took place on the western edge of the town of Minot and injured exclusively Minot residents. All of the environmental cleanup and activities relating to persons injured by the derailment took place in Minot. Basic track maintenance is likewise the responsibility of local North

[1] See this Court's Memorandum of Law Denying Punitive Damages.

Dakota crews who are assigned to particular "sections" along the Canadian Pacific's mainline. Six section crews totaling nineteen employees are charged with performing basic maintenance on the "Portal Subdivision," which runs from Portal, North Dakota to Harvey, North Dakota and includes the location where the train derailed on January 18, 2002.

Overall supervision of the maintenance work done on the "Portal Subdivision" takes place in Minnesota. Soo Line Railroad Company has historic ties to Minnesota, having been headquartered here since 1915. There are approximately 1,000 employees in the Twin Cities area and multiple aspects of Soo Line Railroad operations are handled in Minnesota, including: General Assistance, Accounting, Canadian Pacific (US) Finance, Commercial Development, Copy Center, Corporate Secretary, Canadian Pacific Police Services, Customer Service Team/Revenue, Freight Claims, Legal Services, Real Estate, and Public Affairs/Regional Carriers.

Funding for both basic and program maintenance is allocated by management in Calgary, Alberta, Canada. The same Calgary management also establishes the applicable standards, policies, and procedures for both basic track maintenance and program projects.

IV. DISCUSSION OF LAW

A. Summary judgment standard.

Summary judgment is the proper mechanism for deciding important legal issues such as choice of law. Under the Minnesota Rules of Civil Procedure, summary judgment is properly granted when:

> [T]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact and that either party is entitled to judgment as a matter of law.

Minn. R. Civ. P. 56.03.

A material issue of fact is one which would affect the outcome of the case. *Pischke v. Kellen,* 384 N.W. 2d 201, 205 (Minn. Ct. App. 1986) (citing *Rathbun v. W.T. Grant Co.,* 219 N.W. 2d 641, 646 (Minn. 1974)).

Summary judgment has been characterized as a "blunt instrument" that "should be employed only where it is perfectly clear that no issue of fact is involved in the cause of action." *Donnay v. Boulware,* 144 N.W. 2d 711, 716 (Minn. 1966). The Minnesota Supreme Court has stated that the "burden is on the moving party to show the absence of any material fact." *Bixler v. J.C. Penny Co., Inc,* 376 N.W. 2d 209, 215 (Minn. 1985) (citing *Barilla v. Clapshaw, 237* N.W.2d 830, 831 (Minn. 1976)); *see Thiele v. Stich,* 425 N.W. 2d 580, 583 (Minn. 1988) (the burden is on movant to establish that no genuine issue of material fact exists). When determining whether the moving party has sustained its burden, the court must view the evidence in a manner most favorable to the nonmoving party. *See Sauter v. Sauter,* 70 N.W. 2d 351, 353 (Minn. 1955); *Ritter v. MA. Mortenson Co.,* 352 N.W. 2d 110, 112 (Minn. Ct. App. 1984) (citing *Greaton v. Enich,* 185 N.W.2d 876, 878 (Minn. 1971)). All doubts and factual inferences must be resolved against the moving party and in favor of the nonmoving party. *Nord v. Herreid,* 305 N.W.2d 337, 339 (Minn. 1981); *see Dempsey v. Jaroscak,* 188 N.W.2d 779, 781-82 (Minn. 1971).

It is only when the movant has satisfied its burden must the nonmoving party then show the existence of a genuine issue of material fact. *Bixler, 376* N.W.2d at 215 (citing *Continental Sales and Equipment Co. v. Town of Stuntz,* 257 N.W.2d 546, 550 (Minn. 1977). If the nonmoving party fails to present specific facts indicating that a genuine issue of material fact exists, summary judgment is proper. *Hunt v. IBM Mid Am. Employees Fed. Credit Union,* 384 N.W.2d 853, 855 (Minn. 1986). In order to successfully oppose a

motion for summary judgment, the nonmoving party cannot rely upon mere averments or denials set forth in its pleadings, but must present specific facts showing that there is a genuine issue for trial. Minn. R. *Civ.* P. 56.05; *see Hunt,* 384 N.W.2d at 855 (the nonmoving party cannot rely on mere general statements of fact.). Moreover, "[t]he court is not required to save the nonmoving party by drawing unreasonable inferences." *City of Savage v. Varey,* 358 N.W.2d 102, 105 (Minn. Ct. App. 1984).

B. A choice of law determination is required.

As a threshold matter, Plaintiffs dispute whether a choice of law analysis is even necessary, especially in the context of punitive damages. A choice of law analysis is required for matters of substantive law. *Davis v. Furlong,* 328 N.W.2d 150, 153 (Minn. 1983).

Minnesota case law is silent on the issue of whether punitive damages are substantive or procedural. Nonetheless, a Minnesota Federal Court has found that statutes of limitation fall in the procedural category. *See Glover v. Merck & Co., Inc., 345* F.Supp.2d 994, 998-99 (D. Minn. 2004). There is a distinct difference, however, between the operation of statutes of limitation and motions to add claims for punitive damages. A determination of whether a statute of limitation applies works to either allow or completely deny a plaintiff his or her day in court. A claim for punitive damages on the other hand, does not extinguish the action altogether, but rather determines what damages a plaintiff is able to request.

Forum shopping is an underlying concern with both statutes of limitation and punitive damages claims, but again there are differences. Regarding statutes of limitation, plaintiffs will choose the forum that does not bar their claims due to statutes of limitation problems (as was the case in *Glover).* This will give them a day in court that they would

otherwise not or no longer have. In cases like these involving the January 18, 2002 Minot derailment, plaintiffs will select a forum based on whether the forum caps punitive damages and the threshold a plaintiff has to meet in order to add a punitive damages claim. This does not give plaintiffs a day in court they would otherwise not have, but rather facilitates their ability to seek more substantial monetary awards, in particular exemplary damages. *See Schumacher v. Schumacher*, 676 N.W.2d 685 (Minn. Ct. App. 2004) (plaintiff injured in Iowa sued in Minnesota to avoid Iowa statute which barred claim). Moreover, many Plaintiffs involved in the instant derailment undoubtedly have suffered injuries, grievously in a number of cases, and the Railroad Defendants' exposure to significant damages is very real - with or without punitive damages.

As mentioned above, the standard for being allowed to bring a claim for punitive damages is lower in Minnesota and there is no cap on punitive damages here. The marked differences between Minnesota's and North Dakota's punitive damages laws;[2] the strong North Dakota interest in this case, which will be further discussed later; and the selection of Minnesota as the forum by many of the most seriously injured Plaintiffs, lead almost inexorably to the conclusion that punitive damages should be analyzed as being substantive in nature, if only to discourage forum shopping.

Such conclusion is not without support. Courts in other states have addressed punitive damages as a matter of

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[2] This Court has denied Plaintiffs' motion to add punitive damages claims under both the North Dakota and the Minnesota standards. The fact that the outcome ended at the same point does not diminish the fact that North Dakota's threshold question for punitive damages is significantly higher than Minnesota's. In fact, this Court noted that the decision to deny punitive damage claims was not nearly as difficult under North Dakota law as it was under Minnesota law.

substantive law. *See Harlan Feeders, Inc. v. Grand Laboratories, Inc.*, 881 F.Supp. 1400, 1408 (N.D. Iowa 1995) ("[N]o authority . . . runs contrary to the proposition that punitive damages are a matter of substantive law . . ."); *Naughton v. Bankier*, 691 A.2d 712, 716 (Md. Ct. App. 1997) (punitive damages for choice of law purposes are substantive in nature).

Numerous cases - including those upon which Plaintiffs rely - have analyzed punitive damages under choice of law principles, which necessarily presupposes that such claims are substantive in nature. *See Johnson v. Occidental Fire and Cas. Co. of NC, 954* F.2d 1581, 1585 (11th Cir. 1992); *Enron Corp. v. Lawyers Title Inc. Corp.*, 940 F.2d 307, 312 (8th Cir. 1991); *In re Air Crash Disaster Near Chicago, 111.*, 644 F.2d 594 (7th Cir. 1991); *In re Aircraft Accident at Little Rock, Ark.*, 231 F. Supp.2d 852 (E.D. Ark. 2002); *Mayes v. Gordon*, 536 F. Supp. 2 (E.D. Term. 1981); *Barr v. Interbay Citizens Bank*, 635 P.2d 441 (Wash. 1981).

Cases applying the *Erie* doctrine - itself a choice of law rule - also illustrate that punitive damages are substantive matters. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989) ("in a diversity action . . . when state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining the amount, are questions of state [substantive] law.") (emphasis added). *See also Griffin v. Red Run Lodge, Inc.*, 610 F.2d 1198, 1206 n.7 (4th Cir. 1979) (availability of punitive damages clearly a matter of substantive law); *Myers v. Richland County*, 288 F.Supp.2d 1013, 1021 (D.N.D. 2003) ("exemplary damages statutes provide a substantive right and therefore state law applies.").

C. The choice of law analysis points to North Dakota.

Minnesota courts apply a three part test to decide which state's laws apply: (1) is there an actual conflict between the states' laws; (2) can the laws of both states be constitutionally applied; and (3) which state's laws are favored by the five *Milkovich*[3] factors. *Jepson v. Gen. Cas. Co. of Wis.*, 513 N.W.2d 467, 469-70 (Minn. 1994).

1. Actual conflicts exist.

As mentioned above, a conflict exists in this case between Minnesota and North Dakota law on the issue of punitive damages. North Dakota has a cap on punitive damages and the threshold for adding a punitive damages claim *is* higher. *See Jacobson v. Universal Underwriters Ins. Group, 645* N.W.2d 741, 745 (Minn. Ct. App. 2002) (conflict existed between Minnesota law, which provided for recovery of pecuniary loss - including financial support, comfort, guidance, and protection that decedent would have provided--and Iowa law, which based damages on the estimated net value of the decedent's estate).

North Dakota tort reforms have created additional conflicts with Minnesota law concerning liability exposure. For example, a North Dakota tortfeasor's liability is several only. N.D.C.C. § 32-03.2-03. Minnesota, on the other hand, still imposes joint and several liability. Minn. Stat. § 604.02 (2004).

A conflict of law exists when there is potential, even if slight, for two states' legal standards to affect the parties differently. *Lommen v. City of E. Grand Forks,* 522 N.W.2d 148, 149 (Minn. Ct. App. 1994). North Dakota and Minnesota laws plainly conflict in establishing Defendants' exposure to and liability for damages.

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[3] *Milkovich v. Saari,* 203 N.W.2d 408 (Minn. 1973).

2. Applying both States' laws.

The second factor - whether each state's laws can be applied so as to afford due process to the parties - favors neither party. As discussed above, both Minnesota and North Dakota have sufficient contacts such that the law of either state could be constitutionally applied. This Court has previously heard motions relating to whether jurisdiction is proper in Minnesota and has ruled that Minnesota has sufficient contacts to allow the case to go forward here. This Court has also indicated on several occasions that North Dakota may have stronger interests in seeing the cases tried there, since the derailment happened in North Dakota and all of the persons injured are North Dakota residents. That North Dakota may have stronger interests does not mean, however, that suit cannot be brought here. This Court has already ruled that it can.

3. The *Milkovich* factors favor application of North Dakota law.

The actual determination of which state's laws govern involves application of the five *Milkovich* factors: (1) predictability of result; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the state's governmental interest; and (5) application of the "better rule of law." *Jepson,* 513 N.W.2d at 470. Like Minnesota, North Dakota applies these factors to choice-of-law analysis. *See Issendorf v. Olson,* 194 N.W.2d 750, 754-55 (N.D. 1972).

In tort actions, the first three factors are usually not controlling. *Schwartz v. Consol. Freightways Corp. of Del.,* 221 N.W.2d 665, 668 (Minn. 1974) ("As pointed out in *Milkovich,* only the last two [factors] are relevant to tort cases.").[4] "Maintenance of interstate and international order"

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[4] "Predictability" is normally relevant only to "consensual transactions where the parties desire advance notice of which state law will govern in future disputes." *Nodak Mud. Ins. Co. v. American Family Mut.* Ins. Co.,

becomes significant, however, when there is evidence of forum shopping. *Jepson,* 513 N.W.2d at 471-72; *see Hague v. Allstate Ins. Co.,* 289 N.W.2d 43, 49 (Minn. 1978), *aff'd,* 449 U.S. 302 (1981).

The fifth and final factor - "application of the better rule of law"—applies only "when the other four factors are not dispositive." *Reed v. Univ. of N.D.,* 543 N.W.2d 106, 109 (Minn. Ct. App. 1996) (citing *Myers v. Gov't Employees Ins. Co.,* 225 N.W.2d 238, 244 (Minn. 1974)). This means that the second, fourth and possibly the fifth factor are applicable to the instant case.

a. Evidence of forum shopping.

Forum shopping is generally disfavored. *Petroleum Co. v. Shutts,* 472 U.S. 797, 820 (1985) ("[P]laintiffs desire for forum law is rarely, if ever controlling."); *Jepson,* 513 N.W.2d at 471-72 ("Minnesota does not have an interest in encouraging forum shopping."). The selection of Hennepin County, as discussed above suggests forum shopping on the part of Plaintiffs. *Stenzel v. State Farm Mut. Auto. Ins. Co., 379* N.W.2d *674, 676* (Minn. Ct. App. 1986) ("Forum shopping becomes a greater concern as contacts with the state diminish.").

The recent decision in *Schumacher v. Schumacher, 676* N.W.2d *685* (Minn. Ct. App. 2004) supports the application of North Dakota law. In *Schumacher,* a son was kicked in the face by his father's horse at an Iowa horse show. *Id.* at *688.* The case was filed in Minnesota where both the father and son resided, and where the father owned and raised horses. *Id.*

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604 N.W.2d 91, 94-95 (Minn. 2000). And "simplification of the judicial task" is not a concern when both states' laws are relatively clear. *Id.* Finally, "maintenance of interstate and international order" is generally not important when, as here, both states have laws directly on point that limit the likelihood of ad *hoc* interference. *Id.*

Despite the obvious ties to Minnesota, summary judgment was granted based on the immunity that Iowa law provided against injuries caused by domesticated animals. *Id.* at 689.

The Minnesota Court of Appeals was particularly concerned about the "maintenance of interstate order" because of the forum shopping implications. *Id.* at 690-91. The court found that "[t]his factor addresses whether applying Minnesota law would manifest disrespect for Iowa or impede the interstate movement of people and goods." *Id.* at 690 (citing *Jepson,* 513 N.W.2d at 471). The Court of Appeals stated that "[e]vidence of forum shopping or evidence that application of one state's law would promote forum shopping, would be an attempt to evade, and would indicate disrespect for, Iowa law." *Id.* at 690-91 (citation omitted).

The *Schumacher* court concluded that applying Minnesota law would encourage forum shopping because "[a]n Iowa citizen injured while participating in a domesticated animal activity would be quick to ascertain the state residence of the animal owner and to sue in any state that does not grant immunity to such owners for domesticated animal activities." *Id.* at 691. The court recognized that "[b]y passing the immunity statute, Iowa has stated its public policy interest in encouraging participation in agricultural activities, like this horse show, because such participation benefits Iowa's economy." *Id.* This factor favors North Dakota law.

b. Advancement of the states' interests

In addition to the discouragement of forum shopping, the advancement of the states' interest supports application of North Dakota law. The state in which the incident occurred plays an important role when addressing the advancement of the states' governmental interests.[5] Furthermore, due process

[5] Minnesota courts do not however, automatically apply the law of the state in which the accident occurred, as was historical practice under a *lex loci delecti* analysis. *Milkovich,* 203 N.W.2d at 410-13.

protections preclude Minnesota from having an interest in the assessment of punitive damages in this litigation. Thus advancement of the states' interests analysis favors application of North Dakota law.

(1) North Dakota's compelling interest.

This Court has already assessed the comparative state interests in this litigation. Turning to the case law, the *Nodak* case involved a Minnesota motorist's no-fault insurer bringing a subrogation claim against a North Dakota resident's liability insurer arising out of an automobile collision in North Dakota. 604 N.W.2d at 92-93. The North Dakota motorist's insurer sought a declaration that Minnesota law governed. *Id.* Applying *Milkovich,* the Minnesota Supreme Court readily concluded that the laws of the state in which the accident occurred, North Dakota, should govern. *Id.* at 94-97.

The Court of Appeals in *Nodak* had "determined that [the fourth *Milkovich]* factor favors application of North Dakota law because the accident occurred in North Dakota." *Id.* at 95 (citation omitted). In reaching this conclusion the appeals court relied upon *American Family Mutual Ins. Co. v. Farmers Ins. Exchange, 504* N.W.2d 307, 309 (N.D. 1993), which held that the laws of the state in which the accident occurred, North Dakota, should govern because the other factors favored neither state's laws.

Like the court of appeals, the Minnesota Supreme Court found the reasoning in *American Family* persuasive because "when all other relevant choice-of-law factors favor neither state's law, the state where the accident occurred has the strongest governmental interest." *Nodak, 604* N.W.2d at 96. In so holding, the court noted that this analysis did not reintroduce the *lex loci delecti* doctrine. *Id.* Rather, the rationale of both supreme courts was based upon each state's interest in addressing "accidents within its borders"; hence

"where all other relevant choice-influencing factors balance out, the forum with the greater interest is the forum where the accident occurred." *Id.* (citation omitted).

In this case the only other relevant choice of law consideration is the previously discussed forum shopping, which strongly favors application of North Dakota law. Thus under *Nodak* the state where the accident occurred - North Dakota - reinforces this Court's conclusion that North Dakota law should apply.

Citing a host of cases arising out of airline disasters, Plaintiffs contend that Soo Line Railroad's incorporation in Minnesota should be dispositive of the choice of law analysis. Those cases, however, turn on the "fortuitousness" of the crash site. *See, e.g., Air Crash Disaster at Sioux City, Iowa, on July 19, 1989,* 734 F. Supp. 1425, 1431 (N.D. Ill. 1990) ("Under any theory of liability, the fact that the accident occurred in Iowa was a mere fortuity."). Given the randomness of where an aircraft comes down, courts making choice of law determinations in those cases give the state of the accident no weight in the analysis. Instead, those courts emphasize the state of incorporation.

In this case, unlike the airplane disaster cases, the accident occurred at a specific place where Plaintiffs allege that the track had been negligently inspected and maintained.[6] Planes fly [6] everywhere and can crash anywhere; trains run on fixed rails and derail from those locations. Thus in many respects the fortuity in the Minot derailment is the railroad's state of incorporation, much more so than the state where the accident occurred. Unlike victims of a place crash who are injured where the aircraft happens to come down, plaintiffs in this

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[6] The complaints contain a number of allegations of negligence by the Railroad Defendants, in addition to the two mentioned here. These are discussed in this Court's Order on Federal Preemption issued alongside this Order.

case have a very definitive and strong connection to the place where their injuries occurred - they live in North Dakota. The airline disaster cases are, therefore, distinguishable.

(2) Constitutional issues

Plaintiffs suggest that Minnesota's interest in compensating tort victims should prevail over the North Dakota contacts in this case. *See, e.g., Jepson, 513* N.W.2d at 472. But punitive damages have less to do with compensating tort victims than discouraging certain corporate behavior: "[p]unitive damages are intended to punish a defendant, or to make an example of a defendant's wrongdoing, not to reward an otherwise-compensated plaintiff." *Williamson v. Prasciunas,* 661 N.W.2d 645, 653 (Minn. Ct. App. 2003). Recent United States Supreme Court cases shed light on the issue of punitive damages rights. *State Farm Mut. Auto Ins. Co. v. Campbell, 538* U.S. *408 (2003); BMW of North America, Inc. v Gore,* 517 U.S. 559 (1996).

In *BMW,* a consumer bought a new car that had been repainted before it was purchased. 517 U.S. at *563.* At trial, BMW was shown to have had sold at least *983* refinished cars nationwide, including 14 in the plaintiffs home state. *Id.* BMW argued that conduct in other states was not relevant, but the trial court disagreed, allowing the jury's award of $4,000 in compensatory damages and $4 million in punitive damages. *Id.* at 565. But because punitive damages are allowed only to "further a State's legitimate interests punishing unlawful conduct and deterring its repetition," the Supreme Court reversed. *Id.* at 568 (emphasis added).

States have no legitimate interest in imposing economic sanctions for wrongful conduct occurring in other states. *BMW,* 517 U.S. at 572. Otherwise, "Alabama would be infringing on the policy choices of other States." *Id.* Therefore, the Court held: "the economic penalties that a State ... inflicts on those who transgress its laws, whether the

penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and its own economy." *Id.*

This conclusion was recently reaffirmed *in State Farm.* The *State Farm* jury awarded punitive damages against an insurance company for bad faith handling of auto claims. 538 U.S. at 413. The plaintiff charged that the company's oppressive claims practices were nationwide in scope. *Id.* at 414. Relying on *BMW,* the insurer sought to exclude out-of-state conduct, but was denied. *Id.* The jury awarded $2.6 million in compensatory damages and $145 million in punitives.

As in *BMW,* the Supreme Court recognized that a state does not "have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." *Id.* at 421. A state's authority to punish is circumscribed because: "A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *Id.* at 422 (citation omitted). Having conclusively limited the basis upon which punitive damages can be awarded, the Court reversed. *Id.* at 428. Lower courts have followed suit.[7] This factor favors North Dakota law.

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[7] *White v. Ford Motor Co.,* 312 F.3d 998, 1020 (9th Cir. 2002) ("punitive damages award unconstitutionally allowed a Nevada jury to punish Ford for out-of-state conduct"); *Johansen v. Combustion Eng g, Inc.,* 170 F.3d 1320, 1333 (11th Cir. 1999) ("The Supreme Court has instructed that punitive damages must be based upon conduct in a single state - the state where the tortious conduct occurred - and reflect a legitimate state interest in punishing and deterring that conduct.");

c. Application of the better rule of law

As discussed previously, the "better rule of law" factor is irrelevant unless the other factors favor neither state. This factor is of limited utility, as the Minnesota Supreme Court "has not placed any emphasis on this factor in nearly 20 years." *Nodak*, 604 N.W.2d at 96. Given the conclusions previously reached, analysis of this factor is unnecessary.

CONCLUSION

Minnesota and North Dakota both have interests in the litigation in these cases. The January 18, 2002 derailment happened in North Dakota and all of the injured persons reside there. At the same time, the cases involve a defendant with ties to Minnesota going back over eighty years, with employees in Minnesota and considerable operations here. All of the factors used by Minnesota courts to address the choice of law issue unanimously weigh in favor of applying North Dakota law. North Dakota law shall therefore be applied to all cases before this Court stemming from the January 18, 2002 derailment.

TNL

Continental Trend Res., Inc. v. OXY USA Inc., 101 F.3d 634, 637 (10th Cir. 1996) *(BMW* "prohibit[s] reliance upon inhibiting unlawful conduct in other states"); *Ace v. Aetna Life Ins. Co., 40* F.Supp.2d 1125, 1133 (D. Alaska 1999) *(BMW* means that "Alaska must leave some room within which the other states can exercise their own interests in defining the precise extent of and in deterring wrongful conduct"); *EEOC v. Wal-Mart Stores, Inc.*, 11 F.Supp.2d 1313, 1326 (D.N.M. 1998) (punitive damages award must relate to conduct occurring within the state); *People ex rel Lockyer v. R.J. Reynolds Tobacco Co.*, 11 Cal. Rptr. 3d 317, 347 (Ct. App. 2004) *("State* does not have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction.").

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 05-1918MN, et al.

TOM LUNDEEN, ETC., *et al.*,
Appellees,

v.

CANADIAN PACIFIC RAILWAY COMPANY, *et al.*,
Appellants.

Appeals from the United States District Court for the
District of Minnesota

The parties are directed to file additional briefs as to whether the remand to state court was appropriate notwithstanding the forum shopping argument briefed to the panel. The briefs should address whether there is federal jurisdiction through jurisdictional or "complete" preemption. Additionally, the briefs should examine such cases as *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), and *Grable & Sons Metal Products, Inc. v. Dame Engineering & Manufacturing*, 125 S. Ct. 2363 (2005), for whether federal jurisdiction lies regardless.

The briefs shall be filed simultaneously and are due on March 3, 2006.

February 13, 2006

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX E

No. 05-107

In the Supreme Court of the United States

WARREN DAVIS, PETITIONER

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction over the district court's order remanding petitioner's claims to state court.

2. Whether petitioner's state-law claims are completely preempted by Title IV of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 481-483.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 481-483, establishes substantive rules governing union elections and provides comprehensive procedures for enforcing those rules. *Trbovich* v. *United Mine Workers of Am.*, 404 U.S. 528, 531 (1972). A union member alleging violations of Title IV may file a complaint with the Secretary of Labor. 29 U.S.C. 482(a). The Secretary must investigate the complaint, determine if there is probable cause to believe that a violation of Title IV has occurred and not been remedied, and, if so, file suit to obtain relief in United States district court. 29 U.S.C. 482(b) and (c).

Title IV is explicit that "[t]he remedy provided by this [title] for challenging an election already conducted shall be exclusive." 29 U.S.C. 483. Accordingly, there is no private right of action to challenge the validity of a union election. *Local No. 82, Furniture & Piano Moving* v. *Crowley*, 467 U.S. 526, 544 (1984). However, a union member may challenge the Secretary's decision not to bring suit, *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), and may intervene in a suit brought by the Secretary, *Trbovich*, 404 U.S. at 536.

2. Petitioner held an elected position—Director of Region 2—within respondent International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW). Pet. App. 2a, 14a. After announcing his intention not to run for reelection and endorsing his assistant director, petitioner arranged at the UAW's Constitutional Convention

for his assistant to withdraw from the election and to nominate him instead. *Id.* at 2a-3a. Petitioner won the election unopposed. *Id.* at 3a.

Petitioner was a member of an unofficial caucus of UAW officers who had informally agreed not to seek office after age 65. Pet. App. 3a. Several members of the caucus were angered by petitioner's surprise decision to run again for office at age 67. *Ibid.* Those members issued a press release stating that petitioner had lied about his plans for retirement and schemed "to deny an honest election to the membership." *Id.* at 10a. The press release called upon UAW convention delegates to eliminate Region 2, redistribute its members among three other regions, and hold new elections in the reconstituted regions. *Id.* at 3a. The delegates voted to eliminate Region 2 and divide it among the other regions. *Ibid.* Elections were held for directors of the new regions, but petitioner did not run in those elections. C.A. App. 328.

3. a. Petitioner sued the UAW in federal district court alleging a violation of Title I of the LMRDA, 29 U.S.C. 411(a)(1) and (2). Pet. App. 3a. The district court dismissed the suit on the ground that it challenged the validity of the UAW's elections and thus was within the exclusive jurisdiction of the Secretary under Title IV. *Davis* v. *UAW*, 274 F. Supp. 2d 922 (E.D. Mich. 2003). The court of appeals affirmed the dismissal. *Davis* v. *UAW*, 390 F.3d 908 (6th Cir. 2004), cert. denied, 125 S. Ct. 1984 (2005).

b. Petitioner also filed a Title IV complaint with the Secretary in which he contended that the elimination of Region 2 was invalid and that he should be installed as Region 2 Director. The Department of Labor conducted an investigation and determined that there had been no violation of Title IV. C.A. App. 328-330. The Department reasoned that the UAW's governing rules did not impose an age limitation on candidacy for union office and that the convention delegates followed the

procedures mandated by the UAW's constitution when they voted to eliminate Region 2. *Id.* at 329-330. Petitioner did not seek judicial review of the Department's determination.

4. In June 2003, petitioner filed this suit in Ohio state court against respondents. Petitioner alleged age discrimination, conspiracy to discriminate on the basis of age, wrongful discharge, retaliation, libel, and defamation, all in violation of Ohio law. Pet. App. 4a. He sought declaratory and injunctive relief, including an order directing respondents to reinstate him as Region 2 Director, as well as back pay, damages, and attorney's fees. C.A. App. 16. Respondents removed the case to federal district court. Pet. App. 4a. As relevant here, they contended that petitioner's claims were completely preempted by Title IV of the LMRDA because the claims would require a determination of the validity of the UAW's elections. *Ibid.* Petitioner filed a motion to remand the case, and the district court granted the motion. *Id.* at 12a-32a.

The district court first observed that "the exclusive remedy for challenging the results of a [u]nion election is by pursuing administrative procedures prescribed by the Secretary of Labor." Pet. App. 29a. The court noted that respondents argued that, in order to decide "one aspect of the relief sought by [petitioner]: reinstatement," the court would be forced "to choose between conflicting Union election results." *Ibid.* The court suggested that the reinstatement claim may therefore have provided the court with "federal preemption jurisdiction." *Id.* at 30a. The court believed, however, that petitioner had abandoned his request for reinstatement in his briefing on the remand motion, thus "mooting" that potentially adequate ground for "LMRDA preemption." *Ibid.*[1] The court concluded that none of petitioner's remaining grounds for

[1] The court was apparently mistaken. See Pet. App. 7a. Both parties agree that petitioner has not abandoned his claim for reinstatement. Pet. 6; Pet. C.A. Br. 11; Resp. C.A. Br. 38.

relief implicated "federal preemption jurisdiction," "necessarily impl[ied] * * * that one or more of the Union's election results were invalid," or was inconsistent with the LMRDA. *Id.* at 30a-31a. The court therefore determined that removal of the case was "not well-taken," and it remanded the case to state court. *Id.* at 32a.[2]

5. The court of appeals reversed and remanded the case to the district court with instructions to dismiss petitioner's claims as precluded by the LMRDA. Pet. App. 1a-11a.

The court first addressed its jurisdiction over the appeal in light of 28 U.S.C. 1447(d), which precludes appellate review of remands authorized by 28 U.S.C. 1447(c), such as remands for lack of subject matter jurisdiction at the time of removal. Pet. App. 6a; see *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976). The court determined that, "[w]here a district court had proper jurisdiction at the time of removal, but events occurring after removal make remand to the state courts appropriate, § 1447(d) does not bar appellate review of the district court's remand order." Pet. App. 6a (citing *First Nat'l Bank of Pulaski* v. *Curry*, 301 F.3d 456, 459 (6th Cir. 2002) (reviewing district court order that remanded supplemental state claims after having resolved federal claims)).

Here, the court of appeals concluded, the district court believed it possessed subject matter jurisdiction at the time of the removal. Pet. App. 7a. The court of appeals reasoned that, in deciding to remand the case, the district court "plainly relied" on its belief that petitioner had, subsequent to removal, "expressed his intent to abandon [his] claim" for reinstatement. *Ibid.* Because the district court remanded the case only after finding that this post-removal event had deprived it of jurisdiction (*i.e.*, eliminated the only federal issue

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[2] Because the district court "conclude[d] it does not have jurisdiction over the case," the court declined to rule on respondents' motions to dismiss the case and to transfer venue. Pet. App. 13a-14a.

from the case), the court of appeals concluded that it had appellate jurisdiction over the remand order. *Id.* at 7a-8a (citing *First Nat'l Bank of Pulaski*, 301 F.3d at 460).

As to the merits of the remand order, the court of appeals concluded that petitioner's state-law claims were properly removed to federal court and were preempted by the LMRDA. Pet. App. 8a-11a. The court reasoned that the claims of age discrimination, wrongful discharge, and retaliation "logically hinge on [petitioner's] assertion that he was lawfully elected," and claims for "post-election relief are relegated to the exclusive jurisdiction of the Secretary of Labor." *Id.* at 10a. The court determined that the remaining claims for libel and slander would likewise "necessarily require a court to revisit" the Secretary's determination that the UAW elections were valid. *Id.* at 11a. The court therefore held that those "claims are also preempted by Title IV of the LMRDA." *Ibid.*

DISCUSSION

The court of appeals concluded that it had appellate jurisdiction based on the well-settled rule that remand orders declining to exercise supplemental jurisdiction are subject to appellate review. That conclusion was based on the unique circumstances of this case and does not implicate any conflict among the courts of appeals that warrants this Court's plenary review. The court of appeals' determination that this case was properly removed to federal court also does not warrant review. There is no conflict among the courts of appeals on whether the LMRDA completely preempts state-law claims challenging the validity of union elections. The question whether there can be complete preemption when the plaintiff cannot invoke an alternative federal cause of action is not properly before the Court. In any event, this case is not an appropriate vehicle through which to resolve that abstract question. The petition for a writ of certiorari should therefore

be denied. Alternatively, the Court may wish to hold the petition pending the Court's decisions in *Kircher* v. *Putnam Funds Trust*, No. 05-409 (argued Apr. 24, 2006), and *Osborn* v. *Haley*, cert. granted, No. 05-593 (May 13, 2006), which involve the application, in different contexts, of 28 U.S.C. 1447(d).

I. THE APPELLATE JURISDICTION QUESTION DOES NOT WARRANT PLENARY REVIEW

A. The Court Of Appeals Based Its Jurisdiction On The Established Rule That Remand Orders Declining Supplemental Jurisdiction Are Subject To Appellate Review

Section 1447(d) provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. 1447(d).[3] This Court has stated, however, that Section 1447(d) must be read *in pari materia* with 28 U.S.C. 1447(c) and therefore bars appellate review only of remands based on the grounds covered by Section 1447(c). *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 345-346 (1976); *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 127-128 (1995). If a remand is based on a ground not covered by Section 1447(c), Section 1447(d) does not necessarily foreclose appellate review. *Thermtron*, 423 U.S. at 345; *Things Remembered*, 516 U.S. at 127.

One ground for remand not covered by Section 1447(c) is a remand of supplemental state-law claims for one of the reasons set forth in 28 U.S.C. 1367(c). For example, when the federal claim in a case is dismissed or abandoned, the district court may remand the case if the court concludes that it is inappropriate to retain jurisdiction over the state-law claims. *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 357 (1988).

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[3] Section 1447(d) excepts from its scope remands in civil rights cases removed under 28 U.S.C. 1443. That exception is not implicated here.

Although this Court has not addressed the question, see *Things Remembered*, 516 U.S. at 129-130 (Kennedy, J., concurring), the courts of appeals have uniformly concluded that remands declining supplemental jurisdiction are subject to appellate review. See 16 James W. Moore et al., *Moore's Federal Practice* § 107.44[2][d], at 107-262 n.53.5 (3d ed. 2006) (citing cases).

The court of appeals relied on that rule in concluding that it had appellate jurisdiction here. The court observed that the district court "plainly relied" on petitioner's purported abandonment of his reinstatement claim "in remanding the case." Pet. App. 7a. "Because the district court remanded [the] case only after finding that [this] post-removal event had deprived it of subject matter jurisdiction," the court of appeals concluded that appellate jurisdiction was proper. *Ibid.* The court explained that, "[w]here a district court had proper jurisdiction at the time of removal, but events occurring after removal make remand to the state courts appropriate, § 1447(d) does not bar appellate review." *Id.* at 6a. The court supported that proposition with a citation to *First National Bank of Pulaski* v. *Curry*, 301 F.3d 456, 459 (6th Cir. 2002), a case in which it had reviewed a district court order remanding supplemental state claims after the court had resolved the federal claims in the case.

Some language in the opinion below could be read to suggest that the decision rested on different reasoning. See, *e.g.*, Pet. App. 7a (referring to a conclusion by the district court that "subject matter jurisdiction had been lost" rather than a discretionary decision by that court not to exercise supplemental jurisdiction). But the court of appeals has clarified its rationale in a subsequent decision. In *DaWalt* v. *Purdue Pharma, L.P.*, 397 F.3d 392 (2005), the Sixth Circuit stated that the post-removal event "doctrine is implicated only when a district court makes a discretionary remand of pendent

state-law claims following the dismissal of a claim or a party." *Id.* at 401. The court cited this case as an example, describing it as a case "reviewing the district court's remand order when a party had 'expressed his intent to abandon [a] claim,' thus converting a case over which the court had subject matter jurisdiction into a case that the district court could remand in its discretion under § 1367." *Ibid.* (quoting Pet. App. 7a). *DaWalt* therefore makes clear that this case does not stand for any broader proposition in the Sixth Circuit.

B. Review Is Not Warranted To Address The Reviewability Of Remand Orders Declining Supplemental Jurisdiction

Petitioner contends (Pet. 16-20) that this Court should grant certiorari to decide whether the court of appeals was correct in concluding that remand orders declining supplemental jurisdiction are subject to appellate review. But there is no reason for this Court to address that question. Petitioner himself acknowledges that all of the courts of appeals that have addressed the issue agree that remand orders declining supplemental jurisdiction are reviewable. Pet. 10; Pet. Reply 4. Moreover, the uniform view of the courts of appeals appears to be consistent with this Court's decisions, which suggest that appellate review is barred only for the categories of remand orders described in Section 1447(c)—*i.e.*, those based on lack of subject matter jurisdiction and those based on other defects in removal. See *Thermtron*, 423 U.S. at 346; *Things Remembered*, 516 U.S. at 127; 28 U.S.C. 1447(c).

Even if this Court's guidance were needed on the question whether remand orders declining supplemental jurisdiction are subject to appellate review, this case would not be an appropriate vehicle through which to provide that guidance. Although the court of appeals treated the case as one in which the district court had declined jurisdiction under 28 U.S.C. 1367(c), it acknowledged that the district court had operated

on the erroneous belief that petitioner had abandoned his reinstatement claim. See note 1, *supra*. Moreover, rather than simply correct that error and remand to the district court, the court of appeals went on to rule that petitioner's claims were properly removed, an issue that would not otherwise have been appealable. If the district court had realized that the reinstatement claim had not been abandoned or the court of appeals had done no more than correct that error and remand, then the district court would have had only two options: (1) retain jurisdiction over the entire case on the theory that the LMRDA completely preempts the reinstatement claim or (2) remand the case on the theory that there is no complete preemption and therefore the court lacked jurisdiction at the time of removal. Neither option would have involved a remand under Section 1367(c), and neither option would have produced an immediately appealable order.

This Court should not address the propriety of appellate review of remand orders under Section 1367(c) in a case that, but for the district court's acknowledged factual error, could not possibly involve a valid remand under that Section. The peculiarity created by the district court's mistaken belief that petitioner had abandoned the reinstatement claim makes this a poor vehicle through which to address that issue.

C. Any Tension Among The Courts Of Appeals On How To Ascertain The Basis For A Remand Order Does Not Warrant Review In This Case

Petitioner contends (Pet. 11-15) that the Court should grant review because the courts of appeals disagree on whether they may look beyond the face of a remand order to determine the actual basis for the remand. Although there may be some tension among the courts of appeals on how to ascertain the basis for a remand order, this Court's review of that question in this case would be premature.

Contrary to petitioner's portrayal of a deep split among the courts of appeals, those courts generally agree that they may analyze a remand order to determine if there is a non-Section 1447(c) basis for the remand, even if the district court has stated that it lacks jurisdiction or has cited 28 U.S.C. 1447(c) or (d). See *Cogdell* v. *Wyeth*, 366 F.3d 1245, 1247-1249 (11th Cir. 2004); *Lindsey* v. *Dillard's, Inc.*, 306 F.3d 596, 599 (8th Cir. 2002); *Archuleta* v. *Lacuesta*, 131 F.3d 1359, 1362 (10th Cir. 1997); *Mangold* v. *Analytic Servs., Inc.*, 77 F.3d 1442, 1450 (4th Cir. 1996); *Baldridge* v. *Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341, 1349 (6th Cir. 1993). Cf. *Spielman* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 128 (2d Cir. 2003) (analyzing ambiguous order to determine basis for remand); *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992) (same).[4]

Statements in some cases suggest that the Fifth Circuit takes a more restrictive approach and views the district court's characterization of its remand order as controlling. The Fifth Circuit has said that "[r]eviewability of a remand order depends entirely upon the trial court's stated grounds

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[4] Petitioner contends (Pet. 12, 15) that the Tenth Circuit treats a district court's good-faith statement that it lacked jurisdiction as conclusively establishing that the remand order was based on Section 1447(c). That is incorrect. In *Archuleta*, the Tenth Circuit held that, notwithstanding "[a] district court's assertion that it lacks subject matter jurisdiction, and even explicit references to § 1447(c)," the court of appeals "will determine by independent review the actual grounds upon which the district court believed it was empowered to remand." 131 F.3d at 1362. Petitioner also misreads the Third Circuit's statement in *Balazik* v. *County of Dauphin*, 44 F.3d 209, 213 (1995), that appellate "review is forestalled only when the *stated reasons* for the remand include procedural or jurisdictional defects." In making that statement, the court meant only that "review is not proscribed even if a remand could have been ordered based on a § 1447(c) ground, but was not." *Ibid.* The court nowhere suggested that it could not analyze a remand order to determine the basis on which the district court actually remanded the case.

for its decision to remand." *Tillman* v. *CSX Transp., Inc.*, 929 F.2d 1023, 1026 (5th Cir.), cert. denied, 502 U.S. 859 (1991). That court of appeals has also said that it will deny appellate review pursuant to Section 1447(d) where the district court has stated that it is remanding for lack of jurisdiction, unless "the district court [has] 'clearly and affirmatively' relie[d] on a non-§1447(c) basis" for the remand. *Heaton* v. *Monogram Credit Card Bank*, 231 F.3d 994, 997 (5th Cir. 2000) (quoting *Copling* v. *Container Store, Inc.*, 174 F.3d 590, 596 (5th Cir. 1999)), cert. denied, 533 U.S. 915 (2001).

The apparent tension in methodology between the Fifth Circuit and the other courts of appeals does not warrant this Court's review at this time. First of all, it is not clear that this kind of disparate methodology gives rise to the type of circuit split that merits this Court's review. Unlike disagreements on broader issues of law, this kind of methodological dispute may have more impact on how district court judges draft remand orders than on the rights of the parties.

Second, it is also unclear how much practical difference there is between the two approaches. Like the other courts of appeals, the Fifth Circuit recognizes that it must examine the remand order to determine whether the district court intended to state a Section 1447(c) ground for remand and that there may be ambiguities in the order that require resolution. For example, in *Heaton*, the court of appeals undertook "a plain and common sense reading" of the remand order before concluding that the "order reveals that [the district court] stated a § 1447(c) basis for remand," and the court of appeals analyzed the order to determine that there was no "'mislabeling' of the basis for remand." 231 F.3d at 997-998. Moreover, in describing a prior decision, the court explained that "elucidation of the grounds for remand was required in order to determine the district court's reasons for remanding"

because "the remand order * * * was at first glance somewhat ambiguous." *Id.* at 998.

Third, even if the Fifth Circuit's different approach may have a practical impact, that court might still align itself with the other courts of appeals without this Court's intervention. The Fifth Circuit has not addressed the issue in an *en banc* opinion. And there is some tension between the Fifth Circuit's approach and this Court's cases on appellate jurisdiction. This Court's cases indicate that "[t]he label attached by the District Court to its own opinion does not, of course, decide * * * the jurisdictional issue," and that the appellate court must "determin[e] * * * the appealability of the trial court's action not by the name the court gave [its decision] but by what in legal effect it actually was." *United States* v. *Sisson*, 399 U.S. 267, 279 n.7 (1970) (citations omitted); see *Sullivan* v. *Finkelstein*, 496 U.S. 617, 628 n.7 (1990) (stating that "[t]he label used by the District Court * * * cannot control the order's appealability in this case").

If the Fifth Circuit's approach proves both significant and persistent, this Court could grant review in an appropriate case from the Fifth Circuit to correct the problem. This case, however, is not a good one in which to resolve any tension between the Fifth Circuit and the other courts of appeals. The Sixth Circuit may well have decided this case the same way even if it followed the Fifth Circuit's approach. Although the court of appeals here clearly engaged in some exegesis, it looked to the text of the district court's order in ascertaining the basis for the remand. The remand order did not invoke Section 1447(c) and did not state that the district court lacked jurisdiction *at the time of removal*.[5] On the con-

[5] The district court stated that it was not ruling on certain motions "[g]iven that [it] concludes it does not have jurisdiction over the case." Pet. App. 13a-14a. But courts sometimes use the term jurisdiction imprecisely. See *Kontrick* v. *Ryan*, 540 U.S. 443, 454 (2004). And it is far from clear

trary, as the court of appeals noted, the remand order "plainly relied" on petitioner's purported abandonment of his claim for reinstatement. Pet. App. 7a. The court of appeals therefore concluded that the order indicated that the district court believed it had jurisdiction at the time of removal and thus was not relying on Section 1447(c). See *ibid.* Instead, the court of appeals determined, the remand was clearly based on a non-Section 1447(c) ground—the district court's conclusion that a post-removal event had eliminated any federal claims from the case and "[made] remand to the state courts appropriate." *Id.* at 6a; see *id.* at 7a-8a.

D. The Court May Wish To Hold This Case Pending Its Decisions in *Kircher* and *Osborn*

As petitioner observes (Pet. 13-14), there is a conflict among the courts of appeals regarding appellate jurisdiction over remand orders issued under the Securities Litigation Uniform Standards Act of 1998 (SLUSA). That conflict is not presented here but is at issue in *Kircher*, No. 05-409. Specifically, *Kircher* presents the question whether 28 U.S.C. 1447(d) precludes appellate jurisdiction over remand orders issued after the district court has determined that claims, which were originally removed under SLUSA's removal provision, do not fall within the scope of SLUSA's preemption provision. See 15 U.S.C. 77p(c) and (d)(4), 78bb(f)(3)(D). The Court's resolution of that question is likely to turn primarily on factors unique to the SLUSA statutory scheme. Nonetheless, to the extent the Court's decision in *Kircher* sheds light on the proper interpretation of Section 1447(d), the Court

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that the district court here meant that it did not have jurisdiction *at the time of removal*, which is the critical inquiry under Section 1447(c), *Pullman Co.* v. *Jenkins*, 305 U.S. 534, 537 (1939), as opposed to meaning that it no longer had jurisdiction because it had decided to remand the state-law claims.

may wish tc hold the petition in this case pending that decision.

The Court may also wish to hold the petition in this case pending the Court's decision in *Osborn*, No. 05-593. In that case, this Court has asked the parties to brief the question whether Section 1447(d) bars appellate review of an order that overturns the substitution of the United States for a federal employee defendant under the Westfall Act, 28 U.S.C. 2679(d), and also remands the case to state court. Like *Kircher*, *Osborn* may provide guidance on how to interpret Section 1447(d). The Court may therefore wish to defer action on this case until the Court has resolved *Osborn* as well. However, because of the different contexts in which Section 1447(d) arises in this case and in *Osborn* and *Kircher*, and because this case does not independently warrant review, it would also be appropriate for the Court to deny the petition rather than carry this case on the Court's docket for a lengthy period of time.

II. THE COMPLETE PREEMPTION QUESTION IS NOT PROPERLY PRESENTED AND, IN ANY EVENT, DOES NOT WARRANT PLENARY REVIEW

Petitioner also seeks review (Pet. 20-26) of the court of appeals' ruling on the merits of the removal question that this case was properly removed to federal court. The issue framed by petitioner is not properly presented and, in any event, does not warrant this Court's review.

Under 28 U.S.C. 1441(b), a civil action filed in state court may be removed to federal court if the plaintiff's claim "aris[es] under" federal law. See *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 6 (2003). Whether an action arises under federal law is determined by the well-pleaded complaint rule, which requires that a federal question be presented by the plaintiff's properly-pleaded complaint. Because a defense

is not part of the plaintiff's well-pleaded statement of his claim, and federal preemption is ordinarily only a defense, preemption generally does not provide a basis for removal. *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 207 (2004). Preemption does provide a basis for removal, however, when a federal cause of action occupies the field within which the plaintiff's claim arises and therefore "wholly displaces" any state-law causes of action on which the plaintiff might otherwise rely. *Beneficial Nat'l Bank*, 539 U.S. at 8. Where such "complete preemption" exists, the plaintiff's properly-pleaded claim "necessarily arises" under federal law even if the plaintiff purports to base the claim entirely on state law. *Id.* at 9; see *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 393 (1987) (citing *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 24 (1983)). Generally, there are two prerequisites for complete preemption: (1) Congress must have created an "exclusive cause of action," and (2) the plaintiff's claim must "come[] within the scope of that cause of action." *Beneficial Nat'l Bank*, 539 U.S. at 8-9; see *Franchise Tax Bd.*, 463 U.S. at 24; *Caterpillar*, 482 U.S. at 388-399.

Petitioner contends that the LMRDA does not completely preempt his state-law claims because, although it gives the Secretary of Labor an exclusive cause of action to challenge the UAW's election on petitioner's behalf, the statute does not give petitioner himself a cause of action. That issue does not warrant review. There is no conflict among the courts of appeals on whether there can be complete preemption by the LMRDA. Indeed, no court, including the Sixth Circuit in this case, has squarely addressed the issue. And the abstract question whether there can ever be complete preemption when the plaintiff himself lacks a federal cause of action is not properly presented by this case, because it was not pressed or passed upon below.

A. There Is No Conflict Among The Courts Of Appeals On Whether The LMRDA Completely Preempts State-Law Claims Challenging Union Elections

The Sixth Circuit in this case is the only court of appeals that has addressed the propriety of removing ostensible state-law claims to federal court based on Title IV of the LMRDA. Even that court, however, did not conduct a traditional complete preemption analysis as set out in this Court's cases. See Pet. App. 8a-11a. Instead, the court of appeals referred generically to preemption and may have decided this case based on the erroneous premise that ordinary preemption is sufficient to justify removal. See *id.* at 11a (reasoning that remand was improper because petitioner's claims were "preempted by Title IV of the LMRDA"). Thus, there is no conflict among the courts of appeals on whether the LMRDA satisfies the requirements for *complete* preemption. Indeed, no court of appeals has squarely addressed that question. It would therefore be premature for this Court to address the issue here.

B. The Complete Preemption Question Presented By Petitioner Is Not Properly Before The Court

Petitioner contends (Pet. 20-26) that the Court should grant review to resolve a conflict in the courts of appeals over whether a claim can be completely preempted by a federal statute that does not provide the plaintiff with a private cause of action. That issue is not properly presented in this case.

Petitioner did not argue in the court of appeals that there is no complete preemption here because the LMRDA does not provide him with a cause of action. Petitioner does not dispute his failure to raise that issue below, but he contends that the issue is merely "a new argument" in support of his claim that there is no complete preemption. Pet. Reply 6. Far from being an additional argument in support of that claim, how-

ever, the cause-of-action question is the only complete-preemption issue that petitioner asks this Court to resolve. The question presented in the petition is framed entirely in terms of whether complete preemption can occur "absent a determination that Congress created an alternative private right of action." Pet. i. Because petitioner did not present that issue to the court of appeals, that court did not address the issue.

This Court does not generally address issues that were neither pressed nor passed upon in the court below. See, *e.g.*, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). There is no reason for the Court to make an exception here.

C. The Novel And Abstract Nature Of The Complete Preemption Question Also Counsels Against Review

Even if the complete preemption question raised by petitioner were properly presented, this case would not be an appropriate one in which to address it. The question whether a federal statute can completely preempt a plaintiff's state-law claims if it does not provide the plaintiff with a cause of action should not be addressed in the abstract. Rather, it should be addressed in the context of a specific statute, and in light of judicial decisions carefully construing the statute, because the answer to the question may vary depending on the particular features of the statutory scheme. No court of appeals has addressed the cause-of-action question in the context of the LMRDA. There is no reason for this Court to attempt to resolve it in the first instance.[6]

The LMRDA falls within the class of federal statutes that displace state causes of action, provide a substitute federal

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[6] Moreover, the Court could not address the complete preemption issue without first deciding whether the court of appeals correctly exercised appellate jurisdiction, a question which, as explained above, implicates idiosyncratic aspects of the decision below and is not worthy of plenary review.

cause of action, but strictly limit the class of plaintiffs who can invoke that cause of action. The LMRDA creates an exclusive federal cause of action to challenge union elections but allows only the Secretary of Labor to invoke that cause of action. See 29 U.S.C. 482(b); *Local No. 82, Furniture & Piano Moving* v. *Crowley*, 467 U.S. 526, 544 (1984). For that category of statutes, the first prerequisite for complete preemption is clearly met: there is an exclusive federal cause of action. The complete preemption inquiry therefore can be understood as turning on whether the second requirement is met, *i.e.*, whether the plaintiff's claim comes within the scope of the federal cause of action. See p. 15, *supra*.

Some of this Court's precedents indicate that the fact that a particular plaintiff is not entitled to invoke a cause of action means that his claim is not within the scope of that cause of action. For example, in *Franchise Tax Board*, this Court held that Section 502(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1132(a), did not completely preempt a suit for back taxes by a state tax board against an employee benefit plan because the suit did not "come[] within the scope of one of ERISA's causes of action." 463 U.S. at 25. The Court reasoned that Section 502(a) does not provide a cause of action to anyone other than "participants, beneficiaries, or fiduciaries," and therefore "[a] suit for similar relief by some other party [like the tax board] does not 'arise under' that provision." *Id.* at 27.

Other of the Court's precedents, however, suggest that a plaintiff's ineligibility to invoke a federal cause of action does not conclusively establish that his claim is outside the scope of that cause of action. In *Avco Corp.* v. *Aero Lodge No. 735, International Ass'n of Machinists*, 390 U.S. 557 (1968), this Court held that an employer's state lawsuit seeking an injunction prohibiting a union from striking fell within the scope of Section 301 of the Labor-Management Relations Act, 29

U.S.C. 185, and was completely preempted, even though the Norris-LaGuardia Act barred the employer from seeking the injunction under Section 301. See 390 U.S. at 560-561. *Avco* demonstrates that a plaintiff's ostensible state-law claim may come within the scope of a federal cause of action and be completely preempted, even if the cause of action does not provide the plaintiff with a remedy. *Caterpillar*, 482 U.S. at 391 n.4. *Avco* thus supports an argument that a plaintiff's claim may fall within the scope of a federal cause of action and be completely preempted, even if the plaintiff is unable to state a valid claim under the cause of action, provided that the plaintiff's claim is within the field regulated by the cause of action. Moreover, when the limits on the federal cause of action are an integral part of the federal scheme, it would seem counterintuitive to find a claim to be not completely preempted precisely because it seeks relief antithetical to the pervasively federal regime.

There is a reasonable argument that private-party claims challenging union elections fall within the field addressed by the LMRDA's exclusive cause of action. The LMRDA makes clear that the remedy it provides is the exclusive means to challenge those elections. 29 U.S.C. 483. Although only the Secretary can bring suit to challenge election results, the Secretary's suit is triggered by a complaint filed by a private party who is aggrieved by the results. 29 U.S.C. 482(a). The Secretary is required to bring suit if there is probable cause to believe that there has been an unremedied violation of the LMRDA that may have affected the outcome of the election. 29 U.S.C. 482(b) and (c). The aggrieved party may seek judicial review of a decision by the Secretary not to bring suit and may intervene in a suit once it has been brought. See *Dunlop* v. *Bachowski*, 421 U.S. 560, 566 (1975); *Trbovich* v. *United Mine Workers of Am.*, 404 U.S. 528, 536 (1972).

Given the unique nature of the LMRDA's remedial scheme and the case law discussed above, whether the cause of action provided by the LMRDA gives rise to complete preemption is not free from doubt. Because that question has not arisen with any frequency, has not yet been squarely addressed by any court of appeals, and is not properly presented in this case, this Court should not undertake to resolve the question here.

CONCLUSION

The petition for a writ of certiorari should be denied. Alternatively, the Court may wish to hold the petition pending the Court's decisions in *Kircher*, No. 05-409, and *Osborn*, No. 05-593.

Respectfully submitted.

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